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CIVIL PROCEDURE REPORTS

CONTAINING CASES UNDER THE
CODE OF CIVIL PROCEDURE
AND
THE GENERAL CIVIL PRACTICE
OF THE
STATE OF NEW YORK.

REPORTED WITH NOTES
BY
PERCIVAL S. MENKEN,
OF THE NEW YORK BAR.

WITH A REFERENCE TO THE SECTIONS OF THE CODE OF CIVIL PROCEDURE CONSTRUED
IN THE OPINIONS CONTAINED IN THE FOLLOWING REPORTS, ISSUED DURING THE
PERIOD COVERED BY THIS VOLUME: NEW YORK REPORTS, VOLS. 160, 161;
APPELLATE DIVISION REPORTS, VOLS. 41 TO 45, INCLUSIVE; MISCEL-
LANEOUS REPORTS, VOLS. 25 TO 28, INCLUSIVE, AND
NEW YORK CIVIL PROCEDURE REPORTS, VOL. 30.

VOLUME XXX

NEW YORK
S. S. PELOUBET
LAW BOOKSELLER AND PUBLISHER
1900

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Rec. Aug. 1, 1900.

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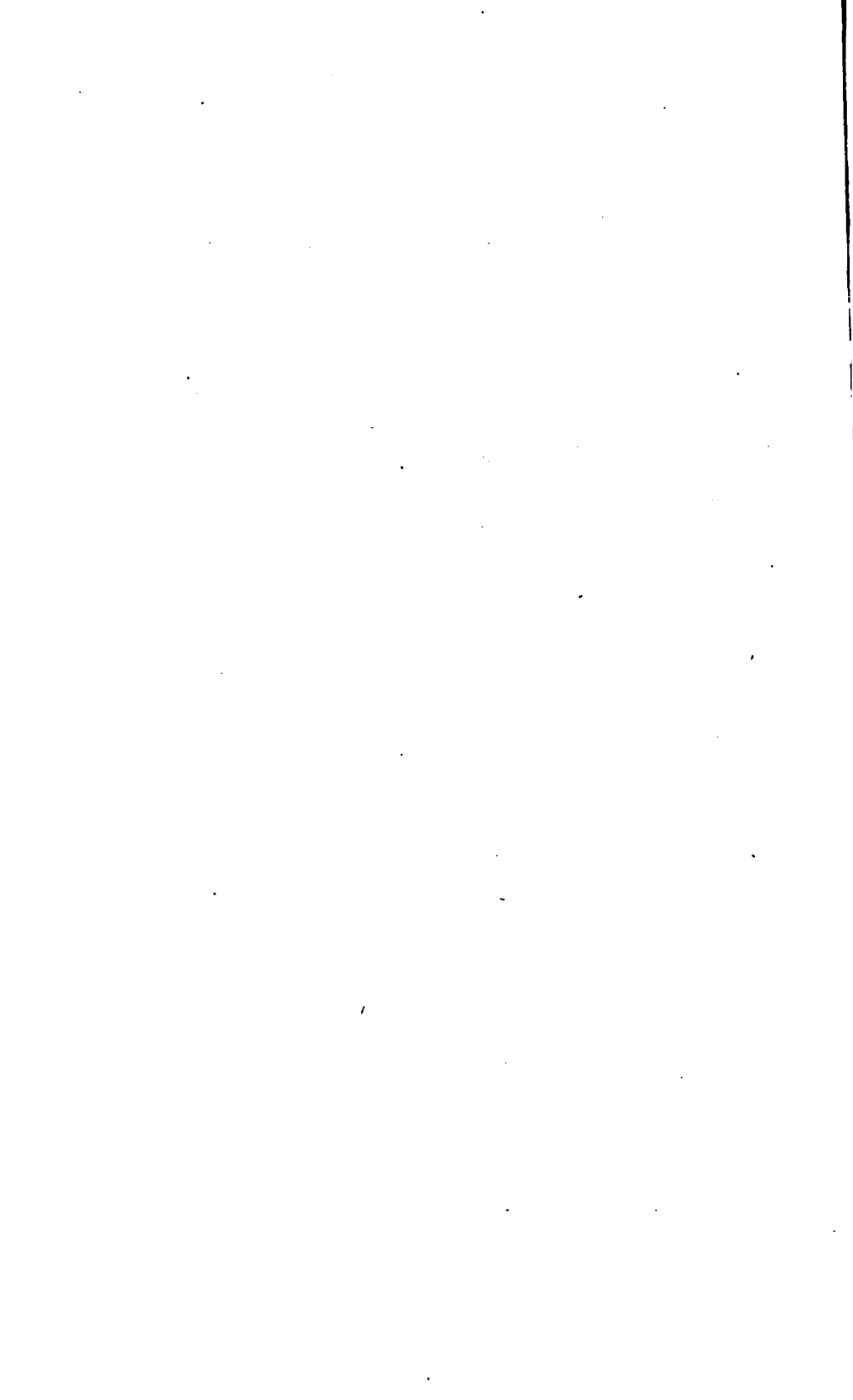
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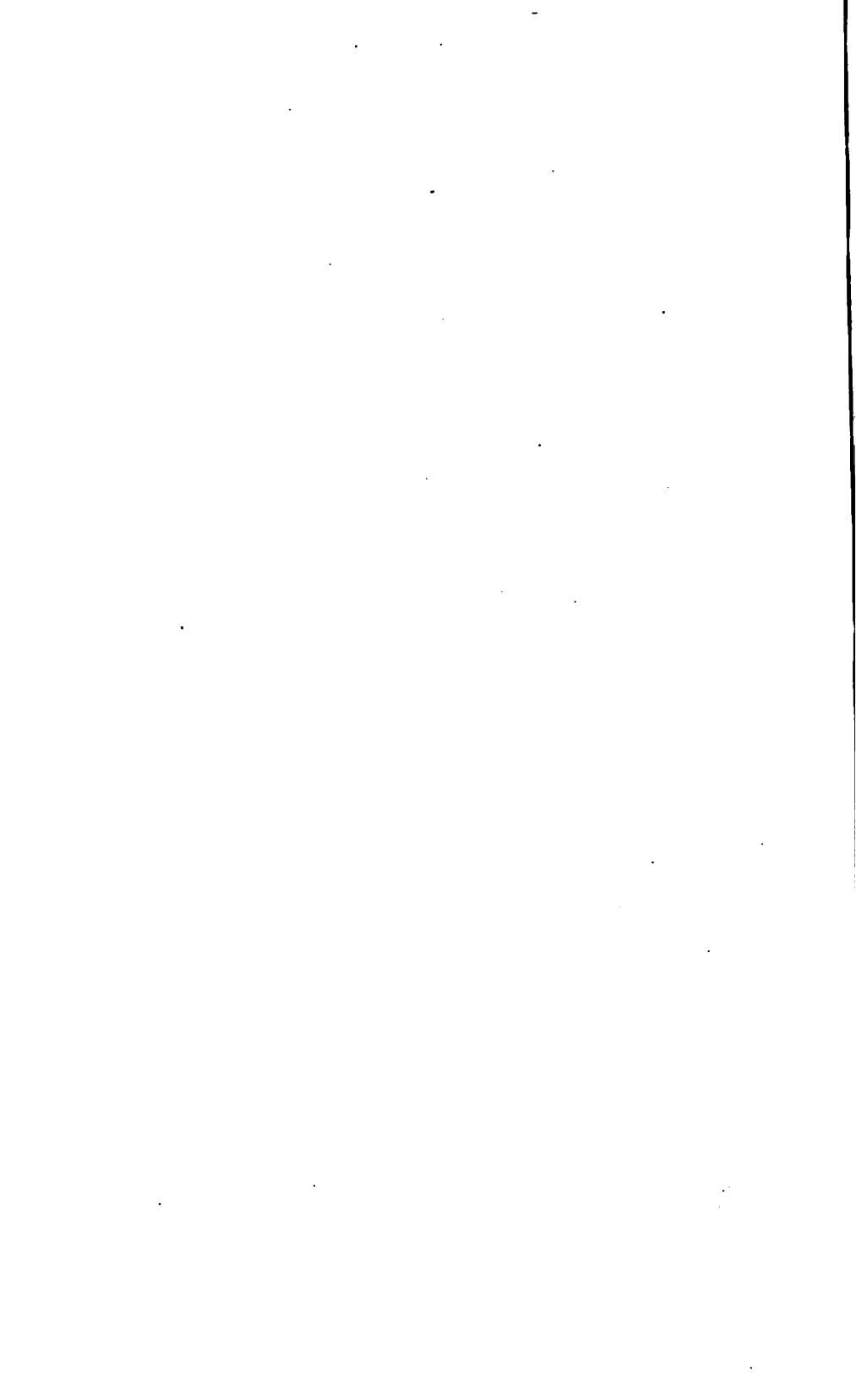


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CIVIL PROCEDURE REPORTS.

IN THE MATTER OF THE APPRAISAL OF THE PROPERTY OF
EMILY M. FITCH, DECEASED, UNDER THE ACT
IN RELATION TO TAXABLE TRANSFERS OF PROPERTY.

COURT OF APPEALS OF NEW YORK.

§ 2476.

Transfer Tax — Jurisdiction of Surrogate's Court to Appoint Appraisers.

The decedent, a non-resident, died in 1894, owning 348 shares of the capital stock of the Consolidated Gas Company of New York. No ancillary letters were taken out or applied for in the State of New York, and the account of the executor was made to and approved by the Probate Court at the domicile of the testatrix and final distribution of her estate directed. Subsequently to such distribution an appraiser under the Transfer Tax Acts was appointed to appraise the property of the decedent within the State of New York by the Surrogate of the County of New York, which appointment decedent's executor sought to have vacated on the ground that the Surrogate had not jurisdiction. Held that said Surrogate's Court had jurisdiction under Section 10, chapter 399, Laws of 1892, and Section 2476, Code of Civil Procedure; that the fact that ancillary letters had not been issued was not material, the test of jurisdiction being whether or not the court had power to issue letters.

(Decided October, 1899.)

This is an appeal from an order of the Supreme Court, Appellate Division, First Department, affirming an order

In Matter of Emily Fitch Estate.

of one of the Surrogates of the County of New York, denying a motion made by the executor of the deceased, to dismiss this proceeding instituted to appraise the property "within the State" of Emily M. Fitch, a non-resident decedent, under the Transfer Tax Acts, on the ground that the Surrogate's Court had not jurisdiction thereof.

The decedent died July 3, 1894, a resident of and domiciled at New Haven, in the State of Connecticut, leaving a last will and testament, which was duly admitted to probate by the Probate Court for the District of New Haven, July 9, 1894, upon which letters testamentary were issued to John B. Fitch, who filed his account in the Probate Court in September, 1895, and made distribution of the decedent's estate before October, 1895.

The decedent, at the time of her death, owned three hundred and forty-eight shares of the capital stock of the Consolidated Gas Company of New York, a corporation organized under the laws of the State of New York, with its main office in the City of New York, the certificates of stock representing such shares being with the decedent at her domicile.

By the provisions of her last will and testament the decedent gave and bequeathed to the said John B. Fitch two hundred and fifty shares of the Consolidated Gas Company stock, as well as other property, in trust for her sister, Sarah F. Wilson, and her nephew, George G. F. Wilson. The rest, residue and remainder of her property was given by the decedent to her nephew, the said John B. Fitch.

The total appraised value of the estate of the decedent within and without the State of New York was the sum of \$200,110.27. John B. Fitch in his affidavit in this proceeding acknowledges holding the funds which "in accordance with the said will" he took over "as trustee thereunder," and hence now holds as trustee the said two

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hundred and fifty shares of the capital stock of the Consolidated Gas Company of New York.

John A. Garver, for executors, appellant.

Emmet R. Olcott, for comptroller, respondent.

PARKER, Ch. J.—The question presented is not whether the property is taxable under the Taxable Transfer Act, under which the surrogate has, in proceedings taken for that purpose, made an order imposing a tax, but whether the Surrogate's Court had jurisdiction to make the order.

The facts out of which the question grows may be briefly stated as follows: Mrs. Emily M. Fitch, a resident of Connecticut, died in that State in July, 1894, leaving a last will and testament, wherein John B. Fitch was named executor. In due course the will was probated in the county of her residence, and before October, 1895, the estate having been duly administered, the executor rendered an account of his proceedings, which was approved by the Probate Court of New Haven, and a final distribution of all of the property in accordance with the terms of the will was made, with the possible exception of some funds which the executor took over as trustee under the will. During the course of administration the executor paid to the State of Connecticut the sum of \$4,451.79, that being the amount of collateral inheritance tax imposed by the laws of that State. In April, 1897, a year and a half thereafter, the Comptroller of the City of New York instituted a proceeding in the Surrogate's Court of that county for the appointment of an appraiser to fix and determine for the purposes of taxation, under the Taxable Transfer Act of the State of New York, the value of the personal property of the said Emily M. Fitch which was situated in the State of New York at the time of her death and which the petitioner asserted was either passed

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or transferred by the terms of the will. The property consisted of 348 shares of the capital stock of the Consolidated Gas Company of New York. It was decided in *Matter of Bronson* (150 N. Y., 1) that shares of stock in corporations incorporated under the laws of this State, represented by certificates in the possession of a non-resident decedent at the time of his death at his domicile out of the State, and which have through his will passed to non-residents, are, nevertheless, subject to taxation under the Transfer Act of 1892. The facts in that case and in this one are substantially alike, and the decision in *Bronson's* case is broad enough in its effect to cover the question presented here, but the appellant contends, and correctly, that in that case counsel did not challenge the jurisdiction of the Surrogate's Court which imposed the tax, and, therefore, the question was not considered by the court. After the decision in *Bronson's* case this court had before it *Matter of Embury* (154 N. Y., 746), where it was held by an affirmance on the opinion below (19 App. Div., 214), that while the statute declared such of *Embury's* property to be taxable as was situated in the City of New York, nevertheless as it omitted to authorize the surrogate to impose the tax, the order made by that officer was without jurisdiction. The statute then under consideration, so far as concerns the question of jurisdiction and the general situation as well, presented a very different question from that before us on this review, so that the case is only in point to the extent that it holds that unless authority is conferred upon the surrogate to impose the tax, an order to that effect is without jurisdiction and void. The Legislature might have provided that where a non-resident dies owning stock in a New York corporation the surrogate of the county where the company has its principal place of business shall have power to impose the tax upon the decedent's interest in the cor-

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poration, but it did not do so, and the appellant insists that the facts appearing in the petition in this record do not bring the matter within the jurisdiction of the Surrogate's Court under any reasonable construction of the statute. So much of the statute as is material in a discussion of the question reads as follows: "The Surrogate's Court of every county of the State having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this act, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this act, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction" (Laws 1892, chap. 399, § 10).

Neither letters testamentary nor ancillary letters were applied for or issued in this case; but that fact has no bearing whatever on the question involved, for the jurisdiction of the court is to be determined by the answer to the question: Had the court power to issue letters? If it had, then, under the statute as it has been construed in the Embury and other cases, the court had jurisdiction to impose the tax; if it had not such power, then the appellant's objection that the surrogate was without jurisdiction is well taken.

Section 2,476 of the Code provides as follows: "The Surrogate's Court of each county has jurisdiction, exclusive of every other Surrogate's Court, to take the proof of a will, and to grant letters testamentary thereon, or to grant letters of administration, as the case requires, in either of the following cases: * * * 3. Where the decedent, not being a resident of the State, died without the State, leaving personal property within that county, and no other; or leaving personal property which has,

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since his death, come into that county, and no other, and remains unadministered." Under the third subdivision, the Surrogate's Court seldom takes jurisdiction, and never does it do so unless the best interests of the estate and that of the parties interested therein will be subserved by its exercise of the jurisdiction which the statute plainly attempts to confer, and when it does it follows the rule laid down by this court in *Parsons v. Lyman* (20 N. Y., 103) as modified by statute. In that case the court affirmed the judgment of the General Term reversing a decree of the Surrogate's Court, by which that court attempted to distribute the assets of an estate disposed of by will, which was properly admitted to probate in the courts of Connecticut, the court holding that the surrogate should have remitted the proceeds collected in the County of New York to the courts of Connecticut for distribution instead of decreeing distribution. The statute also requires that where ancillary letters are issued the persons acting thereunder must transmit the assets to the State, Territory or county where the principal letters are granted (Code, sec. 2,700). There have been many cases where letters have been issued in just such a situation as the statute describes, and among them is *Parsons v. Lyman* (*supra*), but they need be neither marshaled nor considered, as it is sufficient that the statute declares that the Surrogate's Court has jurisdiction in such a case as is described in subdivision three. Examining that subdivision, we see that the surrogate in this case had jurisdiction provided Mrs. Fitch, who was not a resident of the state and died without it, left personal property "within that county and no other." She owned 348 shares of stock in the Consolidated Gas Company of New York; the certificates representing the stock were in her possession in Connecticut at the time of her death, and they passed into the possession of her executor, who was

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also a resident of Connecticut. Was the interest that the decedent had in the Consolidated Gas Company, represented by the certificates that she held "property within that county," i. e., the County of New York?

In matter of Bronson (*supra*) it was held that a non-resident shareholder's interest in corporate property situated in the County of New York is property in that county within the meaning of the Taxable Transfer Act. It is urged that while it is true the decedent's interest in the Consolidated Gas Company is property within this State within the meaning of the Taxable Transfer Act, that it is not property within the contemplation of Section 2,476 of the Code. While much may be said in support of that contention, and, indeed, has been said by the learned counsel for the appellant, it is our view, after an examination of the provisions of Section 10 of the act of 1892 (*supra*), that the Taxable Transfer Act and the sections of the Code providing for the granting of letters testamentary and administration, or of ancillary letters, should be read together as if constituting one enactment. Thus reading them, the taxing provisions of the act and the provisions providing the machinery for collection of the tax are in perfect harmony, and that which is held to be property within the meaning of that portion of the statute which provides that a tax shall be imposed upon its transfer, is also property for the purpose of conferring upon the Surrogate's Court jurisdiction to impose the tax. But if the Taxable Transfer Act and the sections of the Code relating to the issue of letters testamentary and of administration be not read together as one enactment, we are, nevertheless, of the opinion that the interest which the decedent had in the Consolidated Gas Company must be held to be property within the meaning of the word as used in the section of the Code (*supra*).

In Bronson's case (*supra*) the non-resident decedent

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was the owner of shares of the capital stock in some corporations and of bonds in the same or other corporations incorporated under the laws of this State, and the bonds, as well as the certificates, were in the testator's possession at his domicile in Connecticut. As to non-residents, the statute provided for the imposition of a tax upon their "property within the State," and the court held that the bonds in such corporations were not property within the State, and, therefore, not taxable; that they were debts owing by the corporation, like debts owing by individuals, and were not property of the debtors in any sense, but they were property of the creditor, and being in his possession without the State, they could not, of course, constitute property here. But as to the shares in the corporation, the court said: "Shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise. The corporation has a legal title to all the properties acquired and appurtenant; but it holds them for the pecuniary benefit of those persons who hold the capital stock. They appoint the persons to manage its affairs; they have the right to share in its surplus earnings, and, after dissolution, they have the right to have the assets reduced to money and to have them ratably distributed. Each share represents a distinct interest in the whole of the corporate property. * * * Corporate shares must be regarded as property within the broad meaning of that term. Certificates of stock, in the hands of their holder, represent the number of shares which the corporation acknowledges that he is entitled to." While there was a difference of opinion in the court as to whether bonds constitute property "within the statute," there was none whatever as to the shareholder's interest in a corporation created under the laws of this State. All were agreed in the position ex-

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pressed by the court in *Jermain v. Lake Shore & M. S. R. R.* (91 N. Y., 483-492), that the certificates of stock in the possession of the decedent were merely evidence as to the number of shares of stock which the holder had, and that the same rights would have existed whether any certificates had been issued as evidence of those rights or not. In *Plimpton v. Bigelow* (93 N. Y., 592), in an opinion by Judge Andrews, it was said: "The right which a shareholder in a corporation has by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately, on its dissolution, in the assets remaining after payment of its debts."

The court having decided that in such a case as this the property of the shareholder is where the corporate property is, it is quite difficult to see how an assertion to the effect that such a property is not property within the meaning of Section 2,476 of the Code can be supported. It is true that in this case there was no occasion for the issuing of letters; the legatee was apparently content to accept the certificates of stock, and the corporation to transfer them on its books, so that all parties were satisfied. But it might easily have been otherwise had the Consolidated Gas Company refused to transfer the shares on its books, as did the Standard Oil Trust, as appears in the case of *Rice v. Rockefeller* (134 N. Y., 174), where the court held that a *mandamus* would lie to compel the transfer. Mrs. Fitch's executor could not have compelled this transfer, for a foreign executor cannot, in his representative capacity, maintain an action either at law or in equity in this State (*Schulter v. Bowery Bank*, 117 N. Y., 125-129, and cases cited).

Again, a situation might have been presented during the period of administration where the executor would have deemed it his duty to apply to the Supreme Court

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to exercise its general jurisdiction in behalf of the stockholder's common law right of inspection of the books of the corporation, as was done in *Matter of Steinway* (159 N. Y., 250). Or it might happen that during the period of administration the directors of the corporation, unmindful of their duties and in excess of authority, would execute the promissory notes of the corporation payable to one of their number, as in the case of *Metropolitan Elevated R. R. v. Kneeland*, (120 N. Y., 134). In the first instance, it is true, it would have been the duty of the corporation to proceed to protect the stockholders from the effect of such *ultra vires* acts. But it seldom happens that a corporation does thus proceed until after the election of a new board of directors. In the meantime, however, it is the stockholder's right to bring the action (*Cook on Stockholders*, sec. 645). However, as we have seen, the executor of Mrs. Fitch could not have maintained such proceedings until after obtaining letters in this State.

Other illustrations might be cited showing how, in its practical everyday working out, the interest in corporate property, independent of the certificate itself, is treated as property for the purposes of administration. Whether letters shall be granted presents a question of judicial discretion, not of jurisdiction as this court said in speaking of the disposition of funds by ancillary administration (*Matter of Hughes*, 95 N. Y., 55).

The order should be affirmed, with costs.

All concur.

Order affirmed.

Resident.—What constitutes. See *Graham v. Public Adm.*, 4 Bradford, 127; *Isham v. Gibbons*, 1 Bradford, 69.

Domicile distinguished.—*Bartlett v. Mayor*, 5 Sand, 44; *Haggart v. Morgan*, 5 N. Y., 422; *Seiter v. Straab*, 1 Dem., 264.

Jurisdiction of Surrogate.—See *Est. Fitch*, Surrogate's Court, 29

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Civ. Pro., 63; also Reported 39 App. Div., 609; 57 Sup., 212, 786; 91 St. Rep., 212, 786.

See also in re Swift, 137 N. Y., 77; in re Merriam, 141 N. Y., 484; in re Hamilton, 140 N. Y., 213.

THE PEOPLE EX REL. JAMES D. COVENEY,
APPELLANT, v. HENRY S. KEARNEY, AS COM-
MISSIONER, &C., RESPONDENT.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPART-
MENT, DECEMBER, 1899.

§§ 968, 970, 2,083.

Mandamus — Effect of verdict of jury — Removal from public office.

A person removed from a position in a public office in violation of Chapter 577 of the Laws of 1892 is entitled to be reinstated by mandamus.

The verdict of a jury upon an issue raised by an alternative writ of mandamus, as to whether the relator has served for five years in the volunteer fire department in a city of this State, so as to be within the protection of the Act of 1892, is binding upon the court in determining whether the relator is entitled to a writ of peremptory mandamus, unless the verdict is set aside or a new trial granted.

(Decided December, 1899.)

Appeal from order dismissing application for writ of mandamus. Order reversed.

James M. Hunt, for appellant.

Theodore Connolly, for respondent.

INGRAHAM, J.—By the proceeding the relator seeks to compel the respondent, as Commissioner of Public Buildings, Lighting and Supplies in the City of New York, to

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reinstate him as inspector in the Department of Public Buildings, Lighting and Supplies in the City of New York, from which position the relator was removed on February 19, 1898. The court below dismissed the proceeding. The alternative writ of mandamus alleges that, pursuant to the provisions of § 44 of chapter 275 of the Laws of 1892, the relator was, on October 4, 1895, duly and regularly appointed by the Fire Department of the City of New York an inspector of electric wires and appliances. By the act there referred to it is provided that there shall be in the Fire Department of the City of New York a bureau called the bureau of fire alarm telegraph and electrical appliances. "The chief of said bureau shall be called the superintendent of fire alarm telegraph and electrical appliances, and there shall be one or more subordinate officers who shall be called inspectors of electrical appliances." The relator was appointed to and did become a subordinate officer in the Bureau of Fire Alarm Telegraph and Electrical Appliances of the Fire Department of the City of New York. The alternative writ of mandamus also alleges that pursuant to the provisions of the Charter of the City of New York he was transferred from the Fire Department to the Department of Public Buildings, Lighting and Supplies, and thereafter became, and, until February 19, 1898, served as an inspector in the Department of Public Buildings, Lighting and Supplies, when, on February 19th, he was dismissed by the respondent from such position. The writ further alleges that prior to February 19, 1898, the relator had served the time required by law, viz.: five years in the Volunteer Fire Department of the City of Yonkers in this State, and that, pursuant to the provisions of Chapter 577 of the Laws of 1892, he could not be legally removed from his position as an inspector, to which he was appointed by the Fire Department of the former

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City of New York, except for cause shown after a hearing had.

Chapter 577 of the Laws of 1892, amending Section 1 of Chapter 119 of the Laws of 1898, provides that "No person holding a position by appointment in any city or county of this State or who may hereafter be appointed, receiving a salary from such city or county * * * who shall have served the time required by law in the volunteer fire department of any city, town or village in the State * * * shall be removed from such position except for cause shown after a hearing had;" and this act was in force at the time of the removal of the relator and at the time of the commencement of this proceeding. This act was repealed by Chapter 370 of the Laws of 1899, section 29, but it was there provided that "any act done or right accruing, accrued or acquired, or liability, penalty or punishment incurred prior to the passage of this act shall not be affected or impaired; but the same may be asserted, enforced, prosecuted or inflicted as fully, and to the same extent, as if the several acts herein referred to had not been amended or repealed."

Assuming that the removal of the relator by the respondent was a violation of the Act of 1892, the first question presented is whether a person removed in violation of the provisions of that chapter is entitled to be reinstated by mandamus. By the act in question no remedy is prescribed by which a person removed in violation of the provisions of this statute may be reinstated in the office from which he had been illegally removed. A remedy by mandamus is given to honorably discharged soldiers, sailors and marines by Chapter 312 of the Laws of 1884, as amended by Chapter 821 of the Laws of 1896, but the Legislature failed to extend this remedy to volunteer firemen. It is a general provision of law, which has

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been many times applied, that the courts will not, at the instance of a person out of possession of an office, try the title to the office by mandamus or other proceeding, but will leave him to his remedy by information (*Nichols v. MacLean*, 101 N. Y., 536; *Matter of Gardner*, 68 N. Y., 472; *Lewis v. Brush*, 146 N. Y., 60; *People ex rel. Cochrane v. Tracy*, 35 App. Div., 268; *People ex rel. Tate v. Dalton*, 34 App. Div., 6). In all of these cases, however, the question related to the title to a public office where the office had been created by law and where such office had been filled and was in actual possession of another. Thus, in *People ex rel. Wren v. Goetting* (133 N. Y., 570), it is said: "The rule must be regarded as well established by frequent decisions in the courts of this State that the writ of mandamus should be refused to aid the admission of a claimant into an office already filled under color of law and when the title to it presents a disputable question." In *Matter of Gardner (supra)* it is said: "It was settled at a very early period in its judicial history that where a person is already an officer by color of right, the court will not grant a mandamus to admit another person who claims to have been duly elected, and that the proper remedy is by an information in the nature of a *quo warranto*." In *Nicholas v. MacLean (supra)* Andrews, J., says: "The courts held that they would not, at the instance of a person out of possession of an office, try the title to the office by mandamus or other proceeding, but would leave him to his remedy by information, and it has been said in several cases that the title could only be tried in that proceeding." And the reason of this rule is that the court would not determine the right of a person to an office in a proceeding to which the other claimant was not a party and could not be heard. Thus, in *People ex rel. Dolan v. Lane* (55 N. Y., 217), it is said: "If there be a serious question as to the title

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to the office, it ought not be decided against the party in possession in a proceeding in which he has no opportunity to be heard. Mandamus is not the proper remedy in such a case." But it seems to be quite clear that the position occupied by the relator was not a public office within the meaning of this rule. By the act under which the relator was appointed, a bureau in the fire department was established. The chief of such bureau, called the superintendent of electrical appliances, was to be appointed by the fire commissioners. His position would undoubtedly be that of a public officer. There could be but one chief of the bureau, and, when that position was filled, until the incumbent was removed no other person could be appointed to the office. The statute further provided that there was to be one or more subordinate officers who were to be called inspectors of electrical appliances. These positions were strictly subordinate. Their number was not limited by the Legislature, and they were in the nature of assistants or employees. No one office was created by law, but provision was made for the appointment of such subordinates as were necessary to the proper performance of the duties imposed upon the bureau. It would seem to be quite clear that in such a case an action in the nature of a *quo warranto* would not lie, for there was no particular office to which the relator was entitled. There is no allegation that this position from which the relator has been removed had been filled by the appointment of another, or that there was any question as to the title to the office between the relator and one actually occupying the position from which the relator had been removed. The relator had occupied this position, called by the act a subordinate officer. The statute provided that he should not be removed from such subordinate position except for cause shown after a hearing had. In violation of this statute the respondent had removed the relator from such

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position, and it would appear that the only remedy that the relator had was an application to the court for a mandamus to compel the respondent to restore him to the position from which he had been illegally removed. This distinction is illustrated in *People ex rel. Drake v. Sutton* (88 Hun, 174), where the General Term of the Second Department says: "The rule that courts will not, at the instance of a person out of possession of an office, try the title thereto by mandamus, but will leave the party to his remedy by writ of *quo warranto*, has reference to public officers created by law, and is not applicable to clerks or employees unlawfully removed from their positions by superior authority." We think, therefore, that the relator was entitled to institute this proceeding, and, if his removal was illegal, to compel the respondent by mandamus to reinstate him in his position.

We also think that the learned judge at Special Term had no power to go behind the verdict of the jury upon the trial of the issues raised by the alternative writ and determine that the relator was not an exempt fireman within the provisions of the statute referred to. By the alternative writ and the return an issue of fact was raised, viz.: Whether at the time of the relator's discharge he had served the time required by law in the Volunteer Fire Department of the City of Yonkers. Upon a trial of that issue before a jury, the jury found that the relator had served more than five years in the Volunteer Fire Department in the City of Yonkers, before February 19, 1898, when he was dismissed by the respondent. This verdict was binding upon the court at Special Term, in determining the question whether the relator was entitled to a writ. Section 2083 of the Code of Civil Procedure provides that "an issue of fact joined upon an alternative writ of mandamus must be tried by a jury, as if it was an issue joined in an action specified in Section 968 of

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this act." That section refers to a trial by a jury in action to which either party was entitled by right to such trial. By Section 970 of the Code it is provided that the finding of a jury upon a question of fact stated to be tried by a jury in a case where either party can as a right require such a trial is conclusive unless the verdict is set aside or a new trial granted. As an issue of fact joined upon an alternative writ of mandamus must be tried by a jury as if it was an issue joined in an action where a party had a right to trial by jury, its effect, we think, must be the same as the verdict of a jury in such an action and binding upon the court hearing the application for a final order, unless the verdict is set aside or a new trial granted. As the verdict in this proceeding expressly found that the relator had served five years in the Volunteer Fire Department in the City of Yonkers at the time he was discharged, such finding was binding upon the Special Term, and upon the verdict the relator was entitled to be reinstated.

. It follows that the order appealed from must be reversed and the application granted, with costs in this court and in the court below.

All concur.

Under section 2083 issue of fact must be tried by a jury as specified in section 968, unless a jury trial is waived or a reference is directed by the consent of the parties (Peo. ex rel v. Order American Star, 53 N. Y. Sup., 67).

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SARAH GANNON, AS ADMINISTRATRIX OF THE GOODS,
CHATTELS AND CREDITS OF JOHN GANNON, DECEASED,
RESPONDENT, v. CATHERINE MCGUIRE ET AL.,
APPELLANTS.

COURT OF APPEALS OF NEW YORK.

§§ 1022-1338.

Practice — Form of order of reversal on facts — Gifts inter vivos.

When the Appellate Division intends to base its reversal of a decision of the trial court upon a question of fact it should be made to so appear in the record body of the judgment or order; otherwise the findings of the trial court will stand and will be presumed to include all facts, warranted by the evidence, which are necessary to support the judgment.

The essential element of a gift *inter vivos* is delivery by the donor of the subject of the gift with the intent to at once vest title thereto in the donee. Mere words of gift are not enough, for the owner must part with possession and control before the gift can take effect. There must be an intent to make the gift *in praesenti*, because a gift to take effect *in futuro* is void as a promise without consideration. The delivery may be in accordance with the nature of the thing given, provided the circumstances show that the donor intended to divest himself of title and possession, but after the gift is made complete by delivery it is not necessary that the donee shall retain possession of the property, for it may be redelivered to the donor, as the agent of the donee, for safe-keeping. The mere custody of the property, after a complete gift *in praesenti* has been made, is subject to explanation, and its chief importance is its bearing upon the question whether there was an executed gift. In case of a bond and mortgage the delivery of the instruments which represent the debt is a gift of the debt, if that is the intention. (*Decided October, 1899.*)

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, reversing a judgment which dismissed the complaint after a trial at Special Term.

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Abram Kling, for appellants.

James P. Campbell and *Alexander Thain*, for respondent.

PER CURIAM.—The substantial issue presented by the pleadings is whether the mortgage sought to be foreclosed in this action, together with the accompanying bond, were delivered by the plaintiff's intestate to the defendant, Catherine McGuire as a gift *inter vivos*. According to the order of reversal, the learned Appellate Division did not disturb the facts presumed to have been found by the trial court, which include all facts warranted by the evidence and necessary to support the judgment (*People v. Adirondack R'y*, 160 N. Y., —; Code Civ. Pro., secs. 1022-1338). The trial court decided that, prior to the death of plaintiff's intestate, "the defendant, Catherine McGuire, became the owner of the bond and mortgage described in the complaint * * * by virtue of an executed gift from plaintiff's" intestate. If this fact stands, the judgment of the trial court should stand, unless some error was committed during the progress of the trial to the injury of the plaintiff. Whether the fact has the support of any evidence, which, according to any reasonable view, warranted the trial judge in finding it, is a question of law, and is the main question presented for review (*Otten v. Manhattan R'y*, 150 N. Y., 395, 400; *Edson v. Bartow*, 154 N. Y., 199, 217). No question relating to the weight of evidence is before us, for if the Appellate Division intended to base their reversal upon a question of fact, the statute required them to make it clearly appear "in the record body of the judgment or order" (Code Civ. Pro., sec. 1338).

Mrs. McGuire was a cousin of Mr. Gannon, the plaintiff's intestate, and seems to have been his most favored

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relative. By his will, which for some reason was not admitted to probate, he gave her the greater part of his estate. According to all the witnesses who spoke upon the subject, it was his clear intention to make a gift to her of the bond and mortgage in suit, but the testimony of some of them tended to show an intent to make a gift *in futuro* and not *in praesenti*. He signed and acknowledged a conveyance from himself to Mrs. McGuire, embracing the property covered by the mortgage, and, by the advice of his attorney, caused to be prepared a mortgage from Mrs. McGuire to himself for \$8,500, upon the same property, collateral to a bond in the penalty of \$17,000. He then took all these instruments to the residence of Mrs. McGuire, and, according to the testimony of the notary who accompanied him, said to her: "I am giving you this house in Forty-eighth Street. My lawyer, Mr. Cushing, has advised me to take back a bond and mortgage. I protested against it because I did not want the bond and mortgage. The house is to be yours subject to the Emigrants' Savings Bank mortgage. I am doing this just as a matter of form." He then handed her the deed and said: "This is the deed of the property." Thereupon she executed a bond and mortgage and handed them to him. After she had thus executed the bond and mortgage and delivered them to him, he redelivered them to her. She then handed them to him, and he said: "I am taking this to keep for you and put it in a place of safe-keeping, so when I die you shall have this property free and clear from any incumbrance. I am simply doing this at the request of my lawyer, and it will be of no amount because I am keeping it for you, and I will place it in a place of safe keeping for you, to be delivered to you upon my death, upon an order which I will sign to a party to deliver to you." This testimony was corroborated to some extent by that of another witness. Two or three days later he said to

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the notary: "Mr. Ledwith is a particular friend of mine, of the Emigrants' Savings Bank. I meet him occasionally. I will put all the papers with him to be delivered to Mrs. McGuire upon my death." He said he would hold them for her, would surrender them to her upon the order, and that he did not want the mortgage recorded as being a lien upon the property. Referring to the bond and mortgage he said: "You can burn it up."

Shortly afterward he left the papers with Mr. Ledwith, where they remained for about ten months, when he died. A few hours before his death, and in view of that event, he sent for his attorney, Mr. Cushing, and asked him to draw up an order for Mrs. McGuire upon Mr. Ledwith "to get what papers he left with him some time ago, as he did not know the date." Mr. Cushing thereupon drew an order upon Mr. Ledwith requesting him to deliver to the bearer, Catherine McGuire, "the deed, will and all other papers left by me in your care and custody some time ago. I don't recollect the date. 'I am unable to call for these papers myself at present, and, therefore, I want you to deliver them to the said Catherine McGuire. The deed belongs to her.'" After this order was read over to him he pronounced it correct, signed and acknowledged it and personally handed it to Mrs. McGuire, saying that it was for her, and that she could go to the Emigrants' Savings' Bank and get the deed, bond and the papers that he left with Mr. Ledwith. Mrs. McGuire went to the bank, presented the order and received the bond and mortgage with the other papers. She sent the deed to the clerk's office to be recorded, and by mistake the mortgage was sent at the same time and was also recorded.

The essential element of a gift *inter vivos* is delivery by the donor of the subject of the gift with intent to at once vest title thereto in the donee. Mere words of gift are not enough, for the owner must part with possession

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and control before the gift can take effect. There must be an intent to make the gift *in praesenti*, because a gift to take effect *in futuro* is void as a promise without consideration. The delivery may be in accordance with the nature of the thing given, provided the circumstances show that the donor intended to divest himself of title and possession, but, "after the gift is made complete by delivery, it is not necessary that the donee shall retain possession of the property," for it may be redelivered to the donor, as the agent of the donee, for safe-keeping. The mere custody of the property, after a complete gift *in praesenti* has been made, is subject to explanation, and its chief importance is its bearing upon the question whether there was an executed gift. The law as thus announced is settled by the following among many authorities which might be cited: *Westerlo v. DeWitt*, 36 N. Y., 340; *Gray v. Barton*, 55 N. Y., 68; *Young v. Young*, 80 N. Y., 422; *Beaver v. Beaver*, 117 N. Y., 421, 428; *Farleigh v. Cadman*, 159 N. Y., 169, 173; 8 Am. & Eng. Encyc. of Law, 133; 2 Schouler on Per. Prop., sec. 66 *et seq.*; 1 Parsons on Contracts (7th ed.), 234. As was said in *Beaver v. Beaver* (*supra*, 428), "in case of bonds, notes or choses in action, the delivery of the instrument which represents the debt is a gift of the debt, if that is the intention; * * *"

Applying the law to the facts as found by the trial court, upon sufficient evidence according to the rules governing appeals to this court, and we have a completed gift. After the execution and delivery of the bond and mortgage by Mrs. McGuire to Mr. Gannon he had complete title to those instruments, and it was in his power to keep his promise to make her a gift of them or not as he saw fit. The bond and mortgage were his to do with as he chose. He thereupon delivered them to her with the intent, as it must be presumed from the findings, to part with title

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and possession and transfer both to her. Upon acceptance by her, the bond and mortgage became her property, and she could do with them what she chose. It was in her power to retain them in her own possession or to intrust them for safe-keeping to anyone whom she might select. Whether the debt they represented was extinguished by their merger in the deed is now unimportant, and the mere fact that, upon his suggestion, she handed the papers to him for safe-keeping only did not cut down the gift nor change it in any respect. Thereafter he held the papers simply as custodian for her benefit. He had no control over them except as her agent, for by his executed gift he had put it out of his power to repossess himself of them. The gift had become irrevocable, the title had passed and the second delivery to him was as a depositary merely.

Whether the delivery of the order under all the circumstances could be sustained as a gift *causa mortis* it is not necessary to decide, for, as we think, according to the facts found by the trial court and left undisturbed by the Appellate Division, a complete gift *inter vivos* was made.

After examining all the exceptions in the record before us we find none that justifies the reversal by the Appellate Division of the judgment rendered by the trial court. The order appealed from should, therefore, be reversed and the judgment of the Special Term affirmed, with costs.

All concur.

Order reversed, &c.

Section 1022.—Decision; how reviewed (*Health Dept. v. Weeks*, 27 Civ. Pro., 37; *Bomeistler v. Forster*, Id., 46; see also *Fayerweather v. Ritch*, 27 Civ. Pro., 324; *Lingsweiler v. Hart*, 10 App. D., 156-172).

Section 1338.—Scope of Section and power to review (*Bomeister v. Forster*, 27 Civ. Pro., 46-49). When the reversal is not based upon the facts the Court of Appeals is limited to a review for errors

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of law (Parker v. Day, 155 N. Y., 383; Snyder v. Seaman, 157 id., 449; Petrie v. Trustees Hamilton College, 158 N. Y., 458).

HOBBS v. NATIONAL BANK OF COMMERCE
OF KANSAS CITY, MO.

UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT.

§ 394.

Corporations — Action to enforce statutory liability of Stockholders — Limitations.

Whether an action brought in another State to enforce the statutory liability of a stockholder of a Kansas corporation is governed as to limitation by the statutes of Kansas or of the *lex fori, quaere* same, New York statute.

Code Civ. Pro., N. Y., section 394, as amended in 1897, providing that an action against a director or stockholder of a moneyed corporation to enforce a liability "created by law" must be brought within three years after the cause of action accrued, is applicable to an action against a stockholder of a corporation of another State to enforce a liability imposed by the statutes of such State.

WALLACE, Circuit Judge, dissenting.

(Decided July, 1899.)

In error to the Circuit Court of the U. S. for the Northern District of N. Y.

The National Bank of Commerce of Kansas City, Mo., recovered a judgment in an action in the State Court of Kansas, which had jurisdiction of the case, against the Western Farm Mortgage Co., a corporation of Lawrence, Kan. Upon this judgment an execution was issued, which was returned unsatisfied on April 17, 1893. On May 23, 1896, the plaintiff commenced an action at law in the Circuit Court for the Northern District of New York against the defendant, a resident within said district and

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citizen of New York, alleging that he was a stockholder of the Lawrence corporation and was liable to the defendant under the provisions of the constitution and statutes of the State of Kansas. The action was tried by the court upon the written stipulation of the parties, and judgment was rendered for the plaintiff. To review that judgment this writ of error was brought. Judgment reversed.

Charles VanKirk, for plaintiff in error.

Omar Powell, for defendant in error.

Before WALLACE, LACOMBE and SHIPMAN, Circuit Judges. SHIPMAN, Circuit Judge.—The provisions of the constitution and statutes of Kansas which relate to the liability of the stockholders of a Kansas corporation to pay its debts were quoted in the opinion of this court in *Whitman v. Bank*, 28 C. C. A., 404; 83 Fed., 288. In that case it was held that a suit to enforce the liability was transitory in its character, and could be brought by an action at law in a court of another State against a single stockholder who was a resident of such State.

It was further said that the liability was statutory because it did not exist at common law, and was contractual because every one who becomes a member of the company by subscribing to its stock assumes this liability (*Flash v. Conn*, 109 U. S., 371; 3 Sup Ct., 263). The *Whitman* case is now under review by the Supreme Court, and has not been decided.

The other question in the case which is of general importance is in regard to the defense of the statute of limitations. The suit was brought under the provisions of section 32, to be found in *Whitman v. Bank*, (*supra*), and the right of action against the defendant accrued on April 17, 1893, the date of the return of the unsatisfied execu-

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tion, and more than three years before the commencement of this suit. In the Kansas statutes which created the liability of a stockholder, no time limit was established within which an action must be brought to enforce it.

By the general statute of limitations of Kansas, an action upon a liability created by statute, other than a forfeiture or penalty, must be brought within three years after the cause of action accrued. This is the Kansas limitation upon a stockholder's liability under section 32 (Cottrell v. Manlove, Kan. Sup., 49 Pac., 520).

The general rule in regard to statutes of limitation which do not extinguish the claim, but merely prevent the remedy, is that the limitation of action is governed by the *lex fori*, and is controlled by the legislation of the State in which the claim is brought (Telegraph Co. v. Purdy, 162 U. S., 329-339; 16 Sup. Ct., 810; Scudder v. Bank, 91 U. S., 406; Pritchard v. Norton, 106 U. S., 124; 1 Sup. Ct., 102; Insurance Co. v. Eldred, 130 U. S., 693; 9 Sup. Ct., 690; Railway Co. v. Johnston, 26 U. S. App., 85; 9 C. C. A., 587; 61 Fed., 738). There is, however, force in the idea that, when an action is brought in another State to enforce this statutory liability, it is enforced with all the incidents which belong to it in the State of its creation, unless they are against the public policy of the forum.

The statutory form of remedy is exclusive, and a conformity to the statutory bar against a remedy carries into complete effect the principle that the individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute (Pollard v. Bailey, 20 Wall, 520), and adds to it only the declaration that the State which created the liability and the remedy will control the extent of the remedy. It is claimed that this was stated in the opinion in Bank v. Francklyn, 120 U. S., 747; 7 Sup. Ct., 757; in which it was said that "suits

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either at law or in equity, in the Circuit Court to enforce the liability of stockholders under a State statute, are governed by the statute of limitations of the State."

The defense of the statute of limitations did not exist in that case, and it is not certain that the remark was not simply applicable to suits in the Circuit Court in the State which created the liability. The citations which were given were cases of that class.

If the general rule in regard to the *lex fori* is applicable, the defendant urges that by the statute of limitations of New York this suit was barred. The statutes applicable to this liability are contained in the chapter of the Code of Civil Procedure relating to limitations, and are as follows:

"§ 382. Actions barred in six years are an action upon a contract obligation or liability, express or implied, except a judgment or sealed instrument. An action to recover upon a liability created by statute, except a penalty or forfeiture."

"§ 394. This chapter does not affect an action against a director or stockholder of a moneyed corporation or banking association to recover a penalty or forfeiture imposed, or to enforce a liability created by law, but such actions must be brought within three years after the cause of action accrued."

"§ 414. The provisions of this chapter apply and constitute the only rules of limitation applicable to a civil action or special proceeding, except in one of the following cases."

This case is not within the excepted provisions. A "moneyed corporation," spoken of in § 394, is defined in the statutes of New York to be "every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurance" (2 Rev. St., 7th E., p. 1371).

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The Western Farm Mortgage Co. had power to make loans upon pledges or deposits. The plaintiff insists that the history of § 394 shows that it is only applicable to domestic corporations created by the statutes of the State of New York. The history is given in *Brinckerhoff v. Bostwick*, 99 N. Y., 185; 1 N. E., 663, and is substantially as follows: § 109 of the Code of Civil Procedure, as amended in 1849, was formerly § 89 of the Code of 1848, which was taken from § 44, C 4, pt. 3 of the Revised Statutes, which was as follows:

“None of the provisions of this chapter shall apply to suits against directors or stockholders of any moneyed corporations, to recover any penalty or forfeiture imposed or enforce any liability created by the second title of the first part of the Revised Statutes; but all such suits shall be brought within six years after the discovery, by the aggrieved party, of the facts upon which such penalty or forfeiture attached, or by which such liability was created.”

The second title of the chapter of the statutes which was referred to imposed liabilities upon the directors and stockholders of the moneyed corporations authorized by the chapter, and, if the statute of limitations had remained unaltered, it would have been limited by its terms to those liabilities or penalties, and would have been inapplicable to this case.

In 1849 § 89 was amended so as to read as follows:

“This title shall not affect actions against directors or stockholders of a moneyed corporation or banking association, to recover a penalty or forfeiture imposed or to enforce a liability created by law, but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.”

By this amendment the provisions became applicable to

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banking associations, a class of corporations authorized in 1838, and to which the provisions of the second title which had been referred to in the preceding statute did not apply. had been referred to in the preceding statute did not apply (*Robinson v. Bank*, 21 N. Y., 406).

The limitation to the liabilities created by the Revised Statutes was omitted, and the words "liability created by law" were substituted.

In *Brinckerhoff v. Bostwick* (*supra*) it was held that statutory liabilities were still intended, but that the new phrase comprehended "those created by other statutes and by the constitution of 1846." In 1877 the section was simplified and strengthened by striking out "six years after discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created," language which adhered to the idea of a violation of local penal statutes; and the words "three years after the cause of action accrued" were substituted, and, as thus amended, it appears in § 394 of the Code. Inasmuch as the Court of Appeals in the *Brinckerhoff* case had decided that "a liability created by law" meant a statutory liability, the act was further amended by the Legislature of New York in 1897, but after this suit was brought, so that the paragraph now includes a liability "created by common law or by statute."

The history of the statute shows that the Legislature intended to enlarge it, so that it should not be limited to liabilities created by one set of statutes, or imposed upon the officers of the class of corporations which was originally mentioned. It has become a different statute. Its terms are now so broad as to include every class of liabilities of stockholders of moneyed corporations, and should be construed to mean that the liability of stockholders in such corporations should be limited to three years, and

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that the liability of New York stockholders in foreign corporations of that class should run for six years.

The judgment of the Circuit Court is reversed with costs.

WALLACE, Circuit Judge.—I am unable to concur in the proposition that the statute of limitations, as amended after the present action was brought, affords a defense to the action.

As to the constitutionality of section 394 see *Gilbert v. Ackerman*, 159 N. Y., 118; s. c. 29 Civ. Pro., 93; see also *Est. Rosanna Barnes*, 3 Law Rec., 220, 222.

PEOPLE OF THE STATE OF NEW YORK v.
ST. NICHOLAS BANK.

IN THE MATTER OF THE PETITION OF THOMAS J.
DUNN, SHERIFF OF THE COUNTY OF NEW YORK,
RESPONDENT; HUGH J. GRANT, RECEIVER, &C.,
APPELLANT.

SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT.

§ 649, SUB. 3, 1780.

Attachment—Suit between foreign corporations—Insufficiency of affidavit—Insufficient proof of service of warrant and notice—Prior banker's lien on fund.

To sustain an attachment granted in an action against a foreign corporation by another foreign corporation it must have been made to appear by affidavit that a cause of action existed in favor of the plaintiff for a breach of contract. "made within the State or relating to property situated in the State at the time of the making thereof."

If such facts do not appear in the affidavit upon which the attach-

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ment was granted, it cannot be upheld upon the ground that the jurisdictional allegations were made in the complaint, where the complaint was not attached to the affidavit, nor referred to therein nor in the warrant or attachment itself. It cannot be presumed, in the absence of proof in that respect, that the complaint was presented to and considered by the judge who granted the warrant. Conceding that a warrant of attachment was properly issued, Held that an order directing payment to the sheriff under such warrant could not be upheld, as there was no satisfactory evidence in the record that a certified copy of the warrant and notice were ever delivered to and left with the person holding the property attached—the same being incapable of manual delivery—as prescribed by Subdivision 3, section 649, Code of Civil Procedure. The attachment debtor was indebted to the St. Nicholas Bank upon three demand promissory notes, made prior to the alleged service of the warrant, which notes also contained provisions as to collateral security. Held that the bank had a banker's lien upon the deposit sought to be attached, which was prior to whatever lien was acquired by the attachment.

(Decided November, 1899.)

Appeal from order directing payment by receiver of St. Nicholas Bank to Sheriff. The facts appear in the opinion. Appeal Reversed.

Latham G. Reed, for appellant.

Benjamin F. Lee, for respondent.

MCLAUGHLIN, J.—This is an appeal from an order directing the payment by Hugh J. Grant, as receiver of the St. Nicholas Bank, of a sum of money to the Sheriff of the County of New York, in aid of and to apply upon an execution in his hands in an action wherein a warrant of attachment had been granted in favor of the Rubber Reclaiming Company, plaintiff, against the American Casualty and Security Company, defendant. It appears from the papers used upon the motion that the Casualty Company on or about November 24, 1893, had a deposit

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in the St. Nicholas Bank amounting to \$2,342.93; that about that time a warrant of attachment was issued in an action brought by the Rubber Company against the Casualty Company and a levy was attempted to be made upon this balance. The Casualty Company at that time, and for a considerable period prior thereto, had been indebted to the bank upon three promissory notes payable on demand, and amounting in the aggregate to \$43,0000; that on December 23, 1893, the bank closed its doors, and three days later Grant was appointed its receiver. The Casualty Company being indebted to the bank upon the notes referred to, the receiver applied the amount which the Casualty Company then had on deposit upon that indebtedness, alleging a banker's lien upon the fund so applied, and filed his proof of claim with the receiver of the Casualty Company for the balance. The order appealed from directs that the sum thus applied be paid to the sheriff to apply upon the execution in the action of the Rubber Company, and whether or not this can be done depends upon the fact of whether a valid lien was acquired by virtue of the attachment issued in the action.

The receiver (the appellant) assails the order upon the ground, among others, that the court in issuing the warrant of attachment did not acquire jurisdiction to do so, and, therefore, that the warrant and all proceedings taken under it were null and void. This is the main question to be considered.

It is conceded that the Rubber Company and the Casualty Company, the parties to the action in which the warrants of attachment was issued, were foreign corporations, and, therefore, the right to maintain the action was governed by § 1780 of the Code of Civil Procedure. This section, among other things, provides that "An action against a foreign corporation may be maintained by another foreign corporation or by a non-resident in one of

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the following cases only: (1) Where the action is brought to recover damages for the breach of a contract made within the State or relating to property situated in the State at the time of the making thereof." To entitle the plaintiff in the action to a warrant of attachment he was obliged to comply with Section 636 of the Code, which provides that "he must show by affidavit to the satisfaction of the judge granting the same" that a cause of action exists against the defendant for (1) "a breach of contract, express or implied, other than a contract to marry, (2) a wrongful conversion of personal property," (3) "an injury to person or property in consequence of negligence, fraud or other wrongful act" (§ 635). And where the claim is against a foreign corporation, and in favor of another foreign corporation, a cause of action for the breach of a contract does not exist unless the circumstances are such as to bring it within Section 1780 of the Code, referred to. It follows, therefore, that before jurisdiction can be acquired to issue a warrant of attachment against the property of a foreign corporation, at the instance of a foreign corporation or a non-resident, it must be first made to appear by affidavit that a cause of action exists in favor of the plaintiff for a breach of a contract "*made within the State or relating to property situated within the State at the time of the making thereof.*" Were such facts made to appear by affidavit when the warrant of attachment under consideration was granted? Clearly not, so far as appears from the record before us. The warrant itself recited that whereas application has been made for a warrant of attachment "and it appearing by affidavit to the satisfaction of the judge granting the warrant that one of the causes of action specified in Section 635 of the Code of Civil Procedure exists against the defendant," the sheriff is directed to attach the property mentioned. The affidavit upon which the warrant was based

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recites: "That the plaintiff above named is entitled to recover from the defendant above named the sum of \$4,000, with interest from the 30th day of August, 1893, over and above all counterclaims known to the plaintiff, upon one of the causes of action mentioned in § 635 of the Code of Civil Procedure, and particularly set forth in Subdivision II. of this affidavit, no part of which has been paid." Subdivision II. of the affidavit reads as follows: "That the above entitled action is brought to recover a sum of money only as damages for breach of an express contract, viz., a contract in writing of insurance against loss by accident during the period of one year from November 11, 1892, to November 11, 1893, under which by reason of an accident, which occurred on or about August 18, 1893, the plaintiff suffered damages in the sum of more than \$6,000, which the defendant herein became liable to pay to the plaintiff; that the amount of such loss being disputed, thereupon and on or about the 30th day of August, 1893, by agreement in writing, such loss was adjusted at \$4,000, payment of which was thereafter on or about August 30, 1893, demanded by the plaintiff of defendant." And Paragraph V. of the same affidavit states: "That deponent further says that all the allegations in the verified complaint herein and in the verification thereof are true."

It is, therefore, seen that the affidavit in and of itself did not show that a cause of action existed in favor of the plaintiff against the defendant. It fails to state the material facts required by the statute, namely, that the contract for the breach of which damages were claimed was made within this State or related to property situated within the State at the time of the making thereof. The plaintiff was bound to allege and prove the existence of these facts in order to maintain an action against the defendant, and to entitle him to obtain a warrant of attach-

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ment he was bound to establish the same by affidavit. The court could acquire jurisdiction to issue a warrant of attachment against the property of the defendant, a foreign corporation, in no other way. It has been held that, owing to the harshness of the remedy by attachment, the section of the Code referred to should be construed in accordance with the general rule applicable to statutes in derogation of the common law, strictly in favor of those against whom the warrant may be employed (*Penoyer v. Kelsey*, 150 N. Y., 80).

The respondent, in answer to the criticism thus made upon the affidavit, claims that the facts necessary to give the court jurisdiction were set out in the verified complaint, which, for the purposes of granting the warrant, could be treated as an affidavit. It is undoubtedly true that a verified complaint can, for the purpose suggested, be treated as an affidavit, but there is nothing in this record to show that the verified complaint was before or considered by the judge at the time the warrant was issued. It was not attached to the affidavit, nor is it referred to therein, except by the statement that the allegations of the complaint are true. The warrant itself specifically recites that the facts referred to were made to appear to the satisfaction of the judge granting the warrant by "affidavit," and that the "affidavit" shows that the plaintiff is entitled to recover. No reference is made in the warrant to the complaint, and it cannot be presumed, in the absence of proof in that respect, that it was presented to and considered by the judge who granted the warrant. The affidavit, as we have seen, did not show the existence of a cause of action, and, unless the complaint was considered, jurisdiction was never obtained to issue the warrant. There is no proof that the complaint was before the judge, and, therefore, it must be held that the court never acquired jurisdiction to issue the warrant, and that the pro-

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ceedings taken under it to acquire a lien upon the deposit referred to were void.

We are also of the opinion that the order must be reversed for another reason, even if it be conceded that the warrant of attachment was properly issued. To obtain a valid lien under a warrant of attachment upon property incapable of manual delivery, as this property was, it is necessary, under § 649, subdivision 3 of the Code, that a certified copy of the warrant and a notice showing the property attached be delivered to and left with the person holding the same (*Courtney v. Eighth Ward Bank*, 154 N. Y., 688). Neither of these requirements can be dispensed with. The person upon whom the warrant is served is entitled to have a copy of the original warrant duly certified by the sheriff or other officer having the custody of the original, so that he may have official information as to the contents of the original warrant, which he may rely upon and use for his protection as occasion may require (*Courtney v. Eighth Ward Bank*, *supra*). There is no satisfactory evidence in this record from which it can be found that a certified copy of the warrant and the notice were ever served in the manner pointed out in the statute. Substantially the whole proof on that subject consists of the testimony given by the witness Wood, who claims that he was present when the officer made the levy. He testified that he went to the bank and saw two of its officers, and that one Fox, the deputy sheriff, gave them a copy of the warrant and showed them the original, and announced that he levied upon the property of the sheriff there. He also testified in response to the question "Was the copy so delivered to the bank officer certified?" "My memory is that it was." But he did not state by whom it was certified, or whether the notice required by the statute was served with it. The testimony of this witness is unsatisfactory, and is insufficient to show a levy in the

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manner required by the statute, and, without such proof, the court should have declared the attempted levy to be void, and of no effect.

We are also of the opinion that the St. Nicholas Bank had a prior lien upon the money directed to be turned over to the sheriff. A banker's lien attaches in favor of a bank upon securities and moneys of the customer deposited in the usual course of business for all indebtedness of the customer to it then actually due. The St. Nicholas Bank, as we have already seen, was, at the time the warrant of attachment was issued, the owner and holder of three promissory notes, made by the Casualty Company, payable on demand, and aggregating in amount a sum largely in excess of the amount on deposit. These notes were then due (*Wheeler v. Warner*, 47 N. Y., 519; *McMurtha v. Rafferty*, 69 N. Y., 456). The notes being due, the bank had a prior lien on this fund. As was said in *Meyer v. New York County Bank* (36 App. Div., 482): "When a depositor opens an account in a bank, that very act in the absence of an agreement to the contrary authorizes an appropriation of his deposit balance to any matured claims the bank may hold against him, the same as if he then executed an agreement in writing to that effect." The St. Nicholas Bank, therefore, having a prior lien on the fund, the alleged levy made under the warrant of attachment was insufficient to deprive the bank of that lien, and the Special Term should have so held.

For these reasons the order appealed from must be reversed, with \$10 costs and disbursements; and the motion denied, with \$10 costs.

• VAN BRUNT, P. J.; BARRETT and RUMSEY, J. J., concur. INGRAHAM, J., concurs on last ground.

Section 649, sub. 3.—Property incapable of manual delivery can only be attached as provided by the Code, sec. 649, sub. 3 (*Hawkin-*

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son v. Page, 12 Civ. Pro., 279; 19 Abb. N. C., 274; Robinson v. Columbia Spinning Co., 28 Civ. Pro., 135).

But when the property attached is already in the hands of the Sheriff no formal notice is necessary (Marshall v. McGregor, 59 Barb., 519; Atkins v. Saxton, 6 Week Dig., 210).

An unmatured insurance policy is incapable of manual delivery (Kratzenstein v. Lehman, 19 App. Div., 228).

Practice.—It must appear in the complaint that the property was incapable of manual delivery (N. Y. Life Ins. Co. v. Richardson, 2 Law Recd., 25).

Section 1780.—The cases in which a foreign corporation may sue or be sued under the laws of this State are limited to the instances set forth in the section (Duquesne Club v. Penn. Bk., 35 Hun, 390).

ROSE M. LEARY v. LIZZIE J. CORVIN AND
THE CHURCH OF ST. MARY IN THE CITY
OF NEW YORK.

SUPREME COURT, NEW YORK COUNTY, SPECIAL TERM.

§ 829.

Construction of Section 829, Code Civil Procedure — Claim that Plaintiff is entitled to premises in her own right considered upon the facts.

The husband of a party, who will have a tenancy by the curtesy initiate in premises, if his wife's claim thereto be sustained, is not an incompetent witness under Section 829, Code Civil Procedure. Any interested party is incompetent to testify as to conversations in her presence between third persons, under one or more of whom she claims, in like manner, as if the conversations or declarations had been with or made to her directly.

Certain declarations of a former owner of the property in suit, which are alleged to be against his interest, and were said to have been prior to the conveyance by him, Held competent against one claiming to derive title through or from him.

Held, upon the evidence, that a trust was not impressed in favor

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of plaintiff upon real estate, either at the time of its original purchase or upon its subsequent transfer by the person having the legal title.

(Decided September, 1899.)

This is an action brought by the plaintiff as the daughter of Patrick J. Corvin and Mary Corvin, both deceased, to have a deed made and delivered by them to the defendant The Church of St. Mary in the City of New York declared a trust deed for the purposes set forth in the complaint; and for judgment that the plaintiff is now the absolute owner of the property described in said deed, and for a money judgment for \$5,000 against the defendant The Church of St. Mary in the City of New York, and for a money judgment against the defendant Lizzie J. Corvin for \$1,000, and requiring said last named defendant to account for the rents and profits of said property collected and appropriated by her.

The conceded facts of the case are as follows: Patrick J. Corvin and Mary Corvin were husband and wife. The plaintiff is their only child. In 1874 they lived in a rented house, No. 278 Division Street, in the City of New York. For many years said Patrick J. Corvin had been a patrolman on the New York police force, at a salary of \$1,000 per annum, and he was known as a steady, sober and frugal man. His wife kept some boarders, and the plaintiff assisted her in doing the work incident to the household. On the 27th day of March, 1874, the plaintiff deposited in the Greenwich Savings Bank to her credit the sum of \$500; and on the 30th day of March, 1874, the plaintiff deposited in the Seamen's Savings Bank to her credit the sum of \$885. These moneys are said to have been paid to her, by her mother, for the services above mentioned. At this time the mother had about \$7,500 in government bonds, which she was in the habit of carrying about on her person.

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On the 11th day of June, 1874, the plaintiff was married to Martin J. Leary, and she and her husband went to live with the plaintiff's parents at No. 278 Division street.

In 1875 the said Patrick J. Corvin and Mary Corvin told their daughter, the plaintiff, that if she would draw her money out of the banks and give it to them they would purchase a house for a home, where they would all live until the death of the parents, and at their death the plaintiff would have the house. The plaintiff acquiesced in this arrangement. On or about the 17th day of February, 1875, she drew her money out of the savings banks, and in the presence of her mother handed over to her father \$1,385, to be used in the purchase of a home. At this particular time there had been some talk of purchasing a house at No. 127 Broome Street, in New York City, but owing to some alleged defect in the title thereof no purchase was consummated. The money thus paid over to Patrick J. Corvin apparently remained in his hands until 1880, the interval being employed in looking about for a suitable place. In the latter year the premises described in the complaint, and known as No. 279 East Broadway, in New York City, were purchased for \$6,500, subject to two mortgages, one for \$1,500, and the other for \$1,000. It was agreed that the money paid by the plaintiff to her father in 1875, and Mrs. Corvin's money, should be used in paying for the place; that it was to be a home for all of them, and upon the death of her father and mother the property should belong to the plaintiff. The deed to these premises was taken in the name of Patrick J. Corvin, and, as appears by the evidence of the plaintiff, without her knowledge. In the following spring Patrick J. Corvin and his wife, and the plaintiff and her husband, moved into said premises. The plaintiff and her husband occupied separate apartments in the house and paid rent for the same. The latter did

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not live there continuously, however, in the interval between 1880 and 1890. There were times when they lived elsewhere, owing to misunderstandings between the plaintiff's husband and her mother, and there were frequent intervals when the plaintiff was at a sanitarium for the cure of the drink habit, to which she had become addicted since her marriage. During these latter periods the plaintiff's husband went to live with his parents in Brooklyn.

On the 1st day of December, 1890, the said Patrick J. Corvin and Mary, his wife, conveyed said premises, No. 279 East Broadway, to the defendant The Church of St. Mary in the City of New York. No consideration passed from the grantee to the grantors. On the same day the said church conveyed to said Patrick J. Corvin and Mary, his wife, a life estate in said premises during their lives and the life of the survivor of them. Said Corvin and wife remained in possession of said premises. Mary Corvin, wife of said Patrick J. Corvin, died on the 3d day of February, 1892. On the 9th day of February, 1893, said Patrick J. Corvin was married to Lizzie J. Hurley, who is the same person known as the defendant Lizzie J. Corvin herein.

On the 20th day of December, 1892, the defendant, the Church of St. Mary, pursuant to a resolution of its board of trustees, passed December 19, 1892, petitioned the Supreme Court for authority to sell said premises, No. 279 East Broadway, to said Lizzie J. Hurley for \$14,500. The petition stated that the said church was the owner in fee of said property, subject to the life estate therein of Patrick J. Corvin. The reason given for desiring a sale was that the church derived no income from the property and needed the value of its interest therein for the payment of its debts. The said Patrick J. Corvin signed a consent that the prayer of the petition be granted. Thereupon such proceedings were had that an order was made grant-

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ing the prayer of said petition, and directing a sale of said premises to said Lizzie J. Hurley for \$14,500, and that the proceeds of said sale be used in paying the life tenant the value of his interest in said premises and in paying off the indebtedness of said church so far as might be necessary, and the balance, if any, to be invested so as to yield an immediate income to said church.

Pursuant to said order and on the 22d day of December, 1892, the said church by deed, reciting a consideration of \$14,500, conveyed said premises to said Lizzie J. Hurley. On the same day said Thomas J. Corvin, by quit-claim deed, conveyed his life estate therein to said Lizzie J. Hurley for a nominal consideration. On the same day the said Lizzie J. Hurley executed and delivered to Michael J. Newman, James Walsh and William Reilly, as trustees of the last will and testament of John H. Hughes, deceased, a mortgage for \$6,000, from the proceeds of which she paid the Church of St. Mary \$5,000, and the balance of \$1,000 was retained by said Lizzie J. Hurley, out of which she paid the costs of the proceedings and the general expenses attending the sale. Immediately after the making of said mortgage the said Lizzie J. Hurley, for a nominal consideration, reconveyed to said Patrick J. Corvin a life estate in said premises, subject to said mortgage.

Patrick J. Corvin died on the 31st day of March, 1898. Said premises were worth, in 1892, \$14,500. The gross rental thereof is \$900 a year, and the annual expenses are between \$135 and \$200, leaving a net rental of about \$700 a year. Since the death of said Patrick J. Corvin the said Lizzie J. Corvin has collected, to her own use, the rents of said premises. The validity of the mortgage given by said Lizzie J. Hurley to said trustees is not attacked. At the time of the conveyance of said premises to the church the Rev. Nicholas J. Hughes was the pastor of

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said church, and the said Patrick J. Corvin, his wife and daughter were then, and since 1881 had been, members of his congregation. The disputed facts will be discussed in the opinion. Complaint dismissed.

J. Philip Berg, for plaintiff, with *E. C. James* as counsel.

Michael J. Scanlan, for defendant The Church of St. Mary; *Turner, McClure & Rolston*, with *David McClure* as counsel, for defendant Lizzie J. Corvin.

WERNER, J.—The first questions to be decided arise upon objections to the competency of witnesses and of testimony upon which, by stipulation of counsel, decision was reserved. The plaintiff's husband, who will have a tenancy by the curtesy initiate in said premises if his wife's claim is sustained, was a competent witness (*Albany County Sav. Bank v. McCarthy*, 149 N. Y., 71). As to the competency of the plaintiff to testify to the interview between her mother and Father Hughes there is some doubt. The cases of *Simmons v. Sisson* (26 N. Y., 264), *Lobdell v. Lobdell* (36 N. Y., 327), *Cary v. White* (59 N. Y., 336) and *O'Brien v. Weiler* (140 N. Y., 286) seem to hold that a witness who is a party to the controversy and interested in the event of the action is competent to testify to conversations between the deceased, under whom the witness claims, and a third person when it clearly appears that the witness took no part in the conversations. *Gambée v. Gambée* (24 App. Div., 448), *Matter of Dunham* (121 N. Y., 577), *Ditmars v. Sackett* (92 Hun, 384) and *Matter of Bernsee* (141 N. Y., 393) lay down the rule that such a witness is not competent under § 829, Code of Civil Procedure.

The numerous and conflicting decisions of our courts

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under this section of the Code bear ample testimony to the difficulty encountered in attempting to construe its provisions, and to the impossibility of formulating any rule or rules which shall serve as a universal guide. It is quite plain that the courts, in making decisions under this section, have been compelled to consider the facts of each case, quite as much as the language of the statute.

In view of this difficulty and diversity of decision, it may be well to discuss, briefly, some of the cases which have decided against the competency of such witnesses.

In the Matter of the will of Dunham (*supra*) the court held that a nephew of the testator, who was both a specific and residuary legatee under the will, was incompetent to testify to conversations in his presence, between the testator and third persons. It was there stated "that the ground for the ruling is that communications in the presence of the witness are deemed to be made to him."

In *Ditmars v. Sacket* (*supra*) it was held that "it is now quite well settled that the personal transaction or communication between a witness having an interest in the result and a decedent, to which the inhibition applies, includes a transaction or communication of the decedent with another in the presence of the witness on the subject to which his interest relates, although the latter takes no actual part in it."

In Matter of *Bernsee* (*supra*) the latest utterance of the Court of Appeals is in the following language: "What occurred at that time was a transaction between the testatrix and the witness within the meaning of § 829 of the Code, although he took no actual part in the conversation, and it was wholly between the testatrix and the attesting witnesses. If active participation in the conversation was necessary to exclude an interested witness, and he should, as an observer, be permitted to testify to transactions in form between the deceased and third persons, although

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such transactions were in his interest, it would furnish an easy and convenient method of evading the statute. The decisions have enforced the spirit of the statute by excluding such evidence, and have treated transactions between the deceased and third persons in the presence of interested parties as if the witness actually participated therein" (citing *Holcomb v. Holcomb*, 95 N. Y., 316, and *Matter of Eysaman*, 113 N. Y., 62). These cases seem to bear out the statement in *Gambée v. Gambée* (*supra*) that the former rule under said section of the Code "has been somewhat modified of late years."

The conversation between the plaintiff's mother and Father Hughes consisted of the statement by the mother: "This is my only child, this is the one that I want the property held in trust for by the church." This was precisely as though it had been said to the plaintiff, and, under the rule of the *Bernsee* case, was clearly incompetent. This evidence is, therefore, stricken out, and is not considered in the decision upon the merits.

The declarations of Patrick J. Corvin, which are alleged to be against his interest, and which are said to have been made prior to the conveyance to the church, were clearly competent as against him (*Loos v. Wilkin-son*, 110 N. Y., 211; *Bingham v. Hyland*, 6 N. Y., Supp., 75; *Hymes v. Van Cleef*, 39 N. Y. S. R., 810), and are, therefore, competent against those deriving title through or from him (*Baird v. Slaughter*, 28 N. Y. S. R., 667).

The conversations between Mary Corvin, deceased, and Mrs. McCollum and Mrs. Bechdol, respectively, are stricken out by consent, as they should be, for it is quite clear, upon reflection, that neither of them were competent.

There may be some doubt as to the competency of the alleged declarations of Patrick J. Corvin subsequent to the transfer to the church, but in the view which we take of the merits of the case, this doubt will be resolved against

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the plaintiff so as to give her the benefit of an exception. If, however, the evidence contained in these declarations were considered material to the correct decision of the case, we should still be inclined to this ruling, upon the authority of *Sanford v. Ellithorp* (95 N. Y., 48), *Kain v. Larkin* (131 N. Y., 300) and *Williams v. Williams* (142 N. Y., 156). Having thus considered and disposed of these incidental questions, let us examine the principal question.

Was this real estate, at the time of its transfer to the church, impressed with a trust in favor of the plaintiff? In answering this question we must keep in view the fact that the complaint was framed, and the action was tried, upon the theory that there were two separate and distinct trusts created for the benefit of the plaintiff. The first is said to have arisen out of the circumstances attending the original purchase of the property. The second is alleged to have been created in the transfer of the property to the church. After striking out the declarations of the Corvins, subsequent to the transfer to the church, and the conversation between Mrs. Corvin and Father Hughes in the presence of the plaintiff, there is little, if any, foundation left upon which to rear a trust in that transaction. It must be remembered that we are dealing not with the moral aspect of the domestic relations involved, but with questions of law and equity founded upon facts. If we assume, however, for the purposes of this discussion, that all of the evidence which has been ruled out were to be left in the case, it would be impossible to evolve a valid trust out of the transaction with the church. The alleged admissions of the Corvins are utterly at variance with their acts. While professing to have created a trust in favor of their daughter, they had, in fact, made an absolute conveyance of their real estate to the church, subject only to their respective life estates. It may be conceded that the

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mere form of the transaction is of no consequence, for equity always looks through the forms to the substance of things. But if there was a trust created in this conveyance to the church, what was its object? It is not suggested that it was to have the church take charge and control of the property for the benefit of the plaintiff; on the contrary, it is claimed that the sole object of this alleged trust was to have the church convey the property to the plaintiff upon the death of the survivor of the Corvins. What was to be gained by such a peculiar proceeding? Nothing, except that the plaintiff was to have title to the property after the death of her parents. It does not require the training of a lawyer, nor intellectual acuteness of a very high order, to perceive that no such red tape was required, if that was the object to be attained. If the title had been left just where it was before the transfer to the church, it would have come to the plaintiff in due time by mere operation of the most simple and fundamental law of inheritance. But it is urged that Mary Corvin was ill; that she thought her husband was weak and might marry again; that, in order to prevent any complications which might arise out of a second marriage, the plan was devised which was finally adopted. This argument ignores two prominent factors in the case. The first is Patrick J. Corvin. The second is the plaintiff. The former held the legal title to the property, and the latter was afflicted with an appetite for drink which threatened her ruin. It is no more reasonable to suppose that Patrick J. Corvin would quietly have divested himself of the title to his real estate because of the possibility of his remarriage after the death of his wife, than it is to assume that, in the face of the daughter's acknowledged infirmity, the parents wished to assure her of the means with which to hasten and complete her moral ruin. It is much more consonant with human experience and reason to believe that these simple people,

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whose modest means were the fruit of years of toil and self-denial, became convinced that the welfare of their daughter, as well as a desire for proper use of their hard-earned estate, demanded that it should not be left to the daughter. Under these circumstances, it is not unnatural that these consistent Catholics should have bethought themselves of the Church. To us who look at this disposition of property in the light and perspective of past events, it is not difficult to see how all that these parents may have desired could have been accomplished with a more generous regard for the future of their child; but, as we have stated, we are dealing with questions of law and fact rather than principles of moral philosophy. The feelings of these parents towards their daughter are shadowed forth by the frequent separations and apparent estrangements caused by the latter's course of life, and find expression in the statement of the mother to Mrs. Doyle: "She has broken my heart, and has caused me to shed many bitter tears." The testimony and the conduct of Father Hughes also bear witness to this view of the transaction with the church. There is nothing in the case upon which to base the assumption that Father Hughes, or anyone else representing the church, urged this disposition of the property upon the Corvins. On the contrary, the attitude of Father Hughes was precisely what would have been expected of a clergyman who has a proper appreciation of the dignity and responsibility of his office. He warned the Corvins of the seriousness of the step they were about to take, and yielded to their requests, only when it would have seemed a dereliction of duty to the church to persist in a refusal. This, of course, assumes the truth of his testimony. And why should we not indulge in this assumption? Father Hughes, although unknown to us personally, appeared to be a fair and creditable witness. He is apparently a creditable representative of the clergy of

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the church to which he belongs. To refuse to believe his uncontradicted evidence in the light of the history of this case would mean that he is worthy of less credence than the average lay witness. Let us hope, for the honor of the clergy, as well as the judiciary, that no such invidious distinction may ever find its way into the rules of evidence.

It remains, then, to inquire whether a trust was impressed upon this property at the time of its original purchase by Patrick J. Corvin, for the benefit of the plaintiff; and whether the defendants, the church and Lizzie J. Corvin, took the property charged with notice of that trust. In the discussion of these questions it will be assumed that if a valid trust was ever created it was never annulled; and that, if the said defendants took title with notice of the existence of such trust, the trust prevails.

Was there such a trust? The answer to this question must be found in the evidence relating to the circumstances under which the property was purchased; and in the contemporaneous and subsequent declarations of the Corvins with reference to the title to said property. The circumstances which antedate the purchase of the property, and which are relied upon to establish a trust in favor of the plaintiff, are, as above stated, that the Corvins and their daughter resided together, the mother and daughter doing the household work, which included that incident to the keeping of two or more boarders and, possibly, some table boarders, and the father following his duties as a policeman at a salary of \$1,000 per year. The mother had about \$7,500 in U. S. bonds, and the daughter had \$1,385 in bank, which is said to have been paid to her for services in assisting her mother.

According to the testimony of the plaintiff's husband, there was a conversation between the plaintiff and her parents in 1875, in the course of which the latter told the former that if she would draw her money out of the bank

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and give it to them, they would purchase a house for a home, where they would all live until the parents' death, and then the plaintiff would have the house. That the plaintiff expressed her satisfaction with the proposed arrangements, and drew her money out of the bank and gave it to her father. At this time there was talk of buying a house in Broome Street, but owing to an alleged defect of title the purchase was not made. No purchase was made until 1880, when the property in suit was bought. During this interval of five years Patrick J. Corvin was continually on the lookout for a suitable place, and kept the moneys paid over to him by the plaintiff. When this property was bought the conversation of 1875 was substantially repeated. The testimony of Leary, the plaintiff's husband, is corroborated by that of the witnesses Galvin, McCollum and Andrews. Mrs. Galvin testifies that about two years before the purchase of the East Broadway property Patrick J. Corvin told her that his daughter Rose had given him her money to purchase a home. That in stating what he said to his daughter he repeated to Mrs. Galvin: "You give it to me, and we will buy a home; we will have it, and you can keep it when you won't be as well able to work as you are to-day." Mrs. Galvin testifies to another conversation with Mr. Corvin in 1886. It seems that at this time the plaintiff was living in Brooklyn, where the witness visited her. She brought the plaintiff's sick child to its grandparents, the Corvins. Mrs. Galvin says she told the Corvins that they should have Rose back there. In reply to this Mr. Corvin said: "She left of her own care, and she shall not come back here;" and then Mrs. Corvin said: "Yes, dad, she will come back," and he said: "No, she won't," to which Mrs. Corvin rejoined: "Yes, she will come back; she has as much right to this house as you have. There is \$1,300 of her earned money in this house, and it is hers after we

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leave it." Corvin said: "You gave her the money," and Mrs. Corvin replied: "Yes, I gave her the money, I admit; but she helped me to earn it, and when she gave it to you she was married and it was as much her husband's as it was hers." Thereupon Corvin said: "Well, just as you say, that is right. I put the money there, and what you say is right."

Mrs. Andrews testifies that she talked with the Corvins both before and after the purchase of the East Broadway house. The first talk was just before they bought it. They (Corvins) said "they wanted to accommodate the invalid mother and sister of Mrs. Corvin, and have a home for Rose when they should die." After they lived in the house the Corvins said "they were so glad they had a home of their own, and that Rose would have it after their death."

It is obvious that these several declarations contain no words which, in their literal meaning, import a trust. Hence, we must look to the surrounding and antecedent circumstances for the meaning which is to be given to the words. It may be well to note in passing that the learned counsel for plaintiff do not claim that the declarations of the Corvins are, in and of themselves, sufficient to create a trust; on the contrary, their claim is that "equity raises a trust out of the confidential relation between plaintiff and her parents, and the transactions between them."

In considering the circumstances in which these declarations were made the court is not required, or even permitted, to adopt, without reservation, the uncontradicted statements of witnesses as to these circumstances, when such statements are at variance with the real truth as shown by other circumstances and conditions. It is stated, for instance, that the moneys furnished for the purchase of the property by Mrs. Corvin and the plaintiff are moneys

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which they had earned. These statements are uncontradicted. But the circumstances show that they are only partially true. If it had been said that it was money which Mrs. Corvin and her daughter had helped to earn it would have been literally true. It would be absurd to argue that in a frugal family like this the husband's salary of \$1,000 per annum was wholly dissipated, while the \$7,500 of U. S. bonds held by the wife and the \$1,385 of money on deposit in the name of the daughter represented their earnings and savings in keeping a few boarders. That is so at variance with human experience as to make it incredible. The circumstances under which the plaintiff's bank accounts were opened and closed also serve to throw doubt upon the story that the money deposited was paid to her for services. Both accounts were opened at the same time. They were neither increased nor diminished in amount during the time they were kept open. They were both closed at the same time. The money withdrawn was thereafter, for a period of five years, kept by the father without objection. These facts render it quite probable that, for reasons best known to Corvin, he preferred to keep his savings in the names of his wife and daughter rather than in his own name. But let us assume that the \$1,385 given by the plaintiff to her father, and by him invested in this property, was actually her money. Did the declarations of the father, under these circumstances, create a condition upon which equity will raise a trust? The title to this property was not obtained by the father under a false pretense, by which the plaintiff was misled, as in *Lamb v. Lamb* (18 App. Div., 250). It was not conveyed to the father under an agreement to hold for the plaintiff and her mother, as in *Goldsmith et al. v. Goldsmith* (145 N. Y., 313). The father did not induce the plaintiff to let him take title under an agreement that he would afterwards convey to her, as in *Wood v. Rabe*

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(96 N. Y., 415). It is alleged and shown here that the plaintiff did not know that the father had taken the deed in his own name. But the only arrangement testified to on behalf of the plaintiff contemplated that very thing. It was clearly understood that the father was to make the purchase and take the deed. If we accept as true the statement that the moneys with which the property was purchased belonged to the mother and daughter, what becomes of the mother's interest? She paid all but \$1,385 of the purchase price. Yet there is no suggestion of a trust in her behalf, and no objection because the deed was in her husband's name. The declarations made by the Corvins at and after the purchase were simply such statements as would naturally be made by a father and mother with whom the acquisition of a house for themselves and their children is the highest ambition in life. At the time when these statements were made the Corvins undoubtedly thought and hoped that this property would furnish them a home during their lives and would be an inheritance for their only child. That was all that was implied in these statements. Subsequent events changed the view of these parents as to the future of their daughter, and, however much we may disagree with them as to the wisdom of their course, we cannot make this the pretext for taking from them their inalienable right to dispose of their property as they thought best. There are circumstances which lend weight to the view, that the claim of the plaintiff by virtue of an alleged trust, which grew out of the original purchase, is simply an afterthought. No such claim was ever made by plaintiff during the lifetime of her parents, although she must have known that the title to this property was in her father's name. Family dissensions, which arose in part on account of her habits and in part because of disagreements between her mother and her husband, led to frequent periods of separation of varying duration.

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The husband paid rent for the apartments occupied by him and the plaintiff, in this property, and ran deeply into debt for plaintiff's care and treatment at the House of the Good Shepherd during her frequent lapses from sobriety, but never a word is uttered or heard about any interest of the plaintiff in this house.

It seems clear, therefore, that the plaintiff has failed to establish a trust in her favor. "While a trust may be implied from acts or words of the person alleged to have created it, to establish it there must be evidence of such acts or words on his part as that the intention to create it arises as a necessary inference therefrom and is unequivocal" (*Wadd v. Hazleton*, 137 N. Y., 215). "The settlor must transfer the property to a trustee, or declare that he holds it himself in trust, and the acts or words relied on must be unequivocal" (*Young v. Young*, 80 N. Y., 422).

If we were to assume that the plaintiff did not know that her father took the title of the property in his own name, she would still be in no better position than she is. § 53 of the statutes relating to uses and trusts is only intended to operate as a protection to persons paying the consideration for a conveyance of property, "when the alienee named in the conveyance has taken the same as an absolute conveyance in his own name, without the consent or knowledge of the person paying the consideration, or where such alienee, in violation of some trust, shall have purchased the lands so conveyed with moneys belonging to another person." It is plain that the plaintiff has not brought herself within this saving clause which, in the cases therein enumerated, preserves the right to resulting trusts.

In view of our conclusion as to the existence of any valid trust herein, we deem it unnecessary to discuss the questions whether the defendants, the church and Lizzie J. Corvin, took title for value and without notice. It may

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be added, however, in referring to this subject, that there is not the slightest evidence that either of them knew of any trust which grew out of the original purchase of the property.

The interviews between the plaintiff and Father Hughes, after the transfer to the church, and the plaintiff's long delay in seeking relief, would add an interesting chapter to this discussion. But, in the view which we take of this case, this would simply serve to lengthen an opinion which, we fear, is already too long. For the reasons above given, the plaintiff's complaint must be dismissed upon the merits, with one bill of costs to the defendants and the usual allowance.

Let findings and judgment be prepared and submitted in accordance herewith.

SARAH E. REESE, RESPONDENT, v. THOMAS J.
REESE, APPELLANT.

SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT.

§ 111.

*Alimony — Commitment for contempt — Construction of Section
111, Code of Civil Procedure.*

The inhibition of Section 111 of the Code of Civil Procedure, with regard to successive terms of imprisonment, does not apply where an earlier commitment was founded upon mesne process and a second commitment is ordered under final judgment in the same action. So Held upon appeal from an order committing defendant for contempt for failure to pay alimony awarded by a final judgment in an action for separation, where it appeared that he had been arrested and remained in prison for the full period of three months, upon a commitment for contempt for failure to

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comply with an order made in the same action awarding alimony *pendente lite*.

(Decided December, 1899.)

Appeal from order committing the defendant for contempt of court.

George W. Deuse, for appellant.

House, Grossman & Vorhaus (Moses H. Grossman of counsel), for respondent.

O'BRIEN, J.—The action was brought for a separation on the grounds of cruelty and abandonment, and the final decree directed the defendant to pay the sum of \$75 per month for the maintenance of the plaintiff and of the children of the marriage, and to give security in the form of a bond or undertaking in the sum of \$1,000.

The defendant, although served with the final decree and a personal demand to comply with its terms, willfully refused to do so; and the court, before whom the facts were brought, made the order adjudging the defendant in contempt, from which this appeal is taken.

In opposition to the motion below, the defendant showed that, while the action was pending and before the final decree, an order was obtained by the plaintiff for the payment by the defendant of alimony *pendente lite*; and that, having failed to comply with the terms of that order, he was adjudged in contempt, arrested by the sheriff and remained in prison the full three months, which is the extent allowed by law. The insistence below, as in this court, is that, having been once arrested in the action, a second arrest is expressly prohibited by § 111 of the Code of Civil Procedure, which reads as follows: "No person shall be imprisoned within the prison walls of any jail for a longer period than three months under an execution

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of any other mandate against the person to enforce the recovery of a sum of money less than \$500 in amount or under a commitment upon a fine for contempt of court in the non-payment of alimony or counsel fees in a divorce case where the amount so to be paid is less than the sum of \$500; and where the amount in either of said cases is \$500 or over, such imprisonment shall not continue for a longer period than six months. It shall be the duty of the sheriff, in whose custody any such person is held, to discharge such person at the expiration of said respective periods without any formal application being made therefor. No person shall be imprisoned within the jail liberties of any jail for a longer period than six months upon any execution or other mandate against the person, and no action shall be commenced against the sheriff upon a bond given for the jail liberties by such person to secure the benefits of such liberties, as provided in articles fourth and fifth of this title for an escape made after the expiration of six months' imprisonment as aforesaid. Notwithstanding such a discharge in either of the above cases, the judgment creditor in the execution, or the person at whose instance the said mandate was issued, has the same remedy against the property of the person imprisoned which he had before such execution or mandate was issued; but the prisoner shall not be again imprisoned upon a like process issued in the same action or arrested in any action upon any judgment under which the same may have been granted. Except in a case hereinbefore specified, nothing in this section shall affect a commitment for contempt of court."

The appellant claims that having once been arrested and imprisoned—though upon an interlocutory order before judgment—the court, by this section, is prohibited from imprisoning him a second time, even upon his refusal to obey a final judgment, the argument being that the second

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arrest is upon the same ground, in the same action and upon a like process.

This precise question has not been passed upon by any appellate court, although other questions arising under the provisions of this same section have been decided. Thus, in the case of *Levi v. Salomon*, reported in 12 Civ. Proc., 125, and in 105 N. Y., 529, an order of arrest was obtained at the beginning of the action, and the defendant having given a bond for the jail limits and having remained therein during six months, moved for a discharge from the limits and from arrest. The motion was granted and the order thereupon entered was subsequently affirmed by the General Term; but on appeal to the Court of Appeals the decision of the lower courts was reversed, and it was said, as stated by the syllabus in the case in 105 N. Y., 529, that "the provision of the Code of Civil Procedure (§ 111, as amended by chap. 672, Laws of 1886) limiting the time of imprisonment upon any execution or other mandate against the person, refers only to a final process or mandate after a judgment fixing the amount due; it does not include orders of arrest issued at the time of the commencement of the action or before any recovery." And in *Winton v. Winton* (53 Hun, 4) it was held that where a defendant has been arrested and imprisoned for the non-payment of alimony previously directed to be paid by the judgment in an action for divorce, and remains in prison under the commitment because of such default of payment for the full term for which he could be imprisoned under § 111 of the Code of Civil Procedure, he is not thereafter liable to arrest and imprisonment for failure to pay alimony subsequently accruing. The ground of that decision was that the second arrest like the first, being after and under the judgment, would necessarily be upon a like process issued in the same action, which is prohibited by the Code.

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This latter case in no way militates against the conclusion reached at Special Term, but furnishes rather an argument in favor of the view that the construction to be given to the words "process" and "mandate," as used in § 111, is that they refer to process after final judgment. This view is strengthened by the section itself, which, in limiting the duration of imprisonment, speaks of imprisonment "under an execution or other mandate * * * to enforce the recovery of a sum of money," and subsequently refers to the fact that, notwithstanding a discharge under the law, "the judgment creditor in the execution, or the person at whose instance the said mandate was issued," has a remedy against the property, and continues, "but the prisoner shall not be again imprisoned upon a like process issued in the same action or arrested in any action upon any judgment under which the same may have been granted."

We have not overlooked the fact that there is a provision that the duration of imprisonment is equally limited to a commitment "upon a fine for contempt of court in the non-payment of alimony, or counsel fees in a divorce case" nor the concluding words that "nothing in this section shall affect a commitment for contempt of court." In construing that part of the section which relates to imprisonment for contempt in failing to pay alimony, upon the principle of *noscitur a sociis*, it must be held to mean imprisonment after judgment or upon a final process or mandate, which is the kind of process which the balance of the section expressly refers to. Reading the section as a whole, its evident purpose was to prevent a person after judgment or final mandate being twice imprisoned in the same action upon a like process; and there is nothing which indicates that it was intended to apply to an interlocutory order for contempt before judgment, or to an order of arrest obtained at the beginning of an action, or

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to any mesne process upon which a person might be arrested before judgment.

Our conclusion is that the court at Special Term was right in its construction of the section that "the inhibition of the statute with regard to the successive terms of imprisonment does not apply where the earlier commitment was founded upon mesne process and a second commitment is ordered under final judgment in the same action."

Order accordingly affirmed, with \$10 costs and disbursements.

All concur.

Section 111 applies to final judgments only.—See *Levy v. Salmon*, 12 N. Y. Civ. Pro., and 10 Civ. Pro., p. 169; also *In Re Coyne*, 13 N. Y., Supp., 797.

The powers of the court to punish for contempt of interlocutory orders for alimony is conferred by Sections 14, 2266 and 2285 of the Code, which are unaffected by Section 111.

By the Laws of 1882, Chap. 410, Secs. 1454 and 1455, the defendant was liable to be prosecuted before one of the City Magistrates as a disorderly person, on the ground that he had abandoned his wife without adequate support, or had left her in danger of becoming a burden upon the public, but not so after final judgment in a suit for separation, the wife's remedy then being to apply to the Court of Equity to enforce such final judgment (*People v. Cullen*, 153 N. Y., 629).

Second Execution.—When a second execution is issued there is no presumption raised that the arrested party was duly discharged at the end of six months (*Sherman v. Grinnel*, 159 N. Y., 50).

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GRACE McDONALD, AS ADMINISTRATRIX, APPELLANT, v. THE METROPOLITAN STREET RAILWAY, RESPONDENT.

SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT.

§ 1187.

Direction of verdict — Discretion of court where there is decided preponderance of testimony on one side or the other — Submission of special questions.

The power given to a jury to render a special or general verdict in their discretion, can be exercised only when no special instructions are given as to the kind of verdict they are to bring in. If such instructions are given it is the duty of the jury to comply with them, and if they are unable to do so, the case stands in relation to that trial precisely as any other case stands upon the disagreement of the jury. Questions may be submitted pending the determination of a motion to direct a verdict, in order that the court may have the benefit of the findings of the jury as to the facts contained in those questions, but the court may decide the motion without such admission if it sees fit.

Where there is a conflict of evidence, the court may submit the case to the jury, even though the testimony may decidedly preponderate on one side or the other, so that a verdict would be set aside as against the weight of evidence. The court is not required to take such action, although it is advisable, unless there is a great preponderance. If, however, the court itself disposes of the case, such action will be approved on appeal if a verdict in favor of the person against whom judgment is so directed could not be sustained.

(Decided January, 1900.)

Appeal from judgment entered upon verdict directed by the court and from the order denying the new trial.

E. L. Mooney, for appellant.

C. F. Brown, for respondent.

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RUMSEY, J.—The action was brought to recover damages for the negligence of the defendant which resulted in the death of the plaintiff's son. At the close of the evidence the court submitted to the jury three questions, directing them to render answers to each one. After some consideration the jury came into court and reported that they had been unable to agree to answers to the questions, but that they had agreed on a verdict. The court refused to allow them to render the verdict agreed upon, or to accept any verdict except in answer to the three questions, and upon the statement of the foreman that they were unable to agree as to them, the court discharged the jury from further consideration of the case, and ordered a verdict for the defendant. From the judgment thereupon entered, and from the order denying the motion for a new trial, the plaintiff appeals.

The counsel for the appellant insists that it was error for the trial justice to refuse to permit the jury to deliver the verdict upon which they had agreed, claiming that in an action of this kind it is the absolute right of the jury to render a verdict if they see fit to do so. It is quite true that the Code of Civil Procedure, § 1187, says that in an action of this kind the jury may render a special or general verdict, in its discretion. That provision is not new in the law, but has existed as long as the trial by jury has existed in its present form. It must be construed, however, with relation to the remaining provisions of the section, by which the court is authorized during the pendency of a motion to direct a verdict, as was the situation here, to submit certain questions of fact to the jury, and require them to answer those questions. When that has been done the jury must answer the questions submitted if they can agree on them, and they have no right to render any verdict except as contained in those answers. The power given to the jury to render a special or general

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verdict in their discretion, can only be exercised when no special instructions have been given to the jury as to the kind of verdict they are to bring into court. When such instructions have been given it is the duty of the jury to comply with them, and if they are unable to do so the case stands in relation to that trial precisely as any other case stands upon the disagreement of the jury. Questions are submitted pending the determination of the motion to direct a verdict, in order that the court may have the benefit of the findings of the jury as to the facts contained in those questions, but the court may decide the motion without such submissions if it sees fit. Nor is the court precluded from determining for itself the question whether the evidence is sufficient to warrant a verdict at any stage of the case, where the evidence is clear and before the jury have finally rendered a verdict if the case has been submitted to them. Certainly where the jury are unable to agree, it is neither unusual nor extraordinary for the justice presiding at the trial, if upon consideration he thinks the case a proper one, to direct a verdict dismissing the complaint. There was no irregularity, therefore, in the practice upon this trial.

It is claimed by the appellant that there was a conflict of evidence, and that for that reason the court erred in taking the case from the jury. It may be assumed that at the close of the plaintiff's evidence she had made a *prima facie* case, which undisputed or explained, would have been sufficient to warrant a verdict in her favor. It is equally true that at the close of the defendant's case the *prima facie* case of the plaintiff had been explained away and destroyed, so that a verdict for the plaintiff, had such a one been rendered, must have been set aside by the court as against the weight of the evidence.

The appellant insists that in those circumstances the court is bound to submit the case to the jury, although if

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a verdict were rendered for the plaintiff it would have been its duty to set it aside at once upon motion. The respondent, on the contrary, claims that in such cases the court is justified in directing a verdict for the defendant, and if it has done so its action will be sustained and the case will not be sent back to secure a useless verdict merely for the purpose of setting it aside.

It is undoubtedly true that where there is a conflict of evidence the court may properly submit the case to the jury if it sees fit, even though the testimony may decidedly preponderate on one side or the other, so that a verdict would be set aside as against the weight of the evidence, but it is equally true that the court will not be required to take such action, although it is advisable to send the case to the jury, except where there is a great preponderance of testimony. But if the court does not see fit to take that course, and has itself disposed of the case, the question then to be determined is whether, upon the evidence, a verdict in favor of the person against whom the judgment has been rendered could be sustained. If not, the action of the court will be approved.

This has been the undoubted rule in this State for many years. In the case of *Stuart v. Simpson* (1 Wend., 376) it was said by the Supreme Court that if the evidence would not authorize the jury to find a verdict for the plaintiff, or if the court would set it aside if rendered, in such cases it is the duty of the court to non-suit the plaintiff.

The same determination was made in the case of *Rudd v. Davis* (3 Hill, 287). In that case the plaintiff was nonsuited, although it is quite clear from the meagre report that there was some evidence to go to the jury. The rule was laid down that it was proper to order a non-suit whenever a verdict for the plaintiff would be set aside as against the weight of the evidence, whatever might be its character. The case was affirmed upon that precise point (7 Hill,

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529). We have examined the cases from that time to the present, and we find that the cases of *Stuart v. Simpson* and *Rudd v. Davis* have been constantly cited with approval upon the foregoing proposition, and we can find no case overruling them. On the contrary, not only have they been followed in the Supreme Court in various cases, but they have also been approved by the Court of Appeals many times (*McMartin v. Taylor*, 2 Barb., 356-361; *Smith v. Sanger*, 3 Barb., 360-369; *Carpenter v. Smith*, 10 Barb., 663-664; *People v. Cook*, 14 Barb., 259-303; *Sheldon v. Hudson River R. R.*, 29 Barb., 226-229; *People ex rel. Peck v. Board of Police, &c.*, 35 Barb., 651).

In *Colt v. Sixth Avenue R. R.* (49 N. Y., 671) it is said in the head notes that it is not enough to justify a non-suit if the court, in the exercise of its discretion, might grant a new trial. It is only where there is no evidence in law, which, if believed, will sustain a verdict, that the court is called upon to non-suit; and the evidence may be sufficient in law to sustain a verdict, although so greatly against the apparent weight of evidence as to justify the granting of a new trial. The decision is only a memorandum, and contains no part of the opinion; but sufficient is apparent, from the case as reported, to show that there was evidence in favor of the plaintiff so that the court refused to non-suit, and that the question presented to the Court of Appeals was only upon the exception to the refusal. That being the case, the Court of Appeals was not called upon to consider any action of the trial court based upon its determination as to the weight of the evidence. All it was at liberty to say, or did say, was that, if there was evidence, the court could not be compelled to non-suit, and it was no error to refuse to do so.

It is doubtful whether that case now represents the law as determined by the Court of Appeals. It is said in the

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case of *Leinkauf v. Lombard* (137 N. Y., 417-426) that the rule was to be regarded as settled—as well by the decisions of the courts of this State as by the courts of England—that where there is no evidence upon any issue before the jury, or the weight of evidence is so preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial justice to direct a non-suit.

What was said in that case was accepted in a subsequent decision of the court, *Hennings v. Nelson* (138 N. Y., 517), where the opinion was delivered by the only justice who dissented in the case of *Leinkauf v. Lombard*. In the absence of some decision of that court we do not think we should be at liberty to depart from the rule there laid down.

Our attention has been called to the case of *Luhrs v. The Brooklyn Heights R. R.* (11 App. Div., 173; 13 App. Div., 126), in which the court declined to follow the broad rule laid down by the Court of Appeals in the two cases above cited, and said that although the evidence may greatly preponderate in favor of one party so that were a verdict rendered against that party it would be set aside, yet that fact does not warrant the court in directing a verdict. The learned justice who delivered the opinion in that case has not cited any of the numerous cases upon that subject which have been reported in the Supreme Court during a period of nearly seventy years. In spite of the weight to be attached to his opinion, were the case a new one, we do not think it is sufficient to overrule what seems to have been the settled practice in this State during all that time.

It is not necessary to discuss here the evidence in this case. A careful reading of it satisfies us not only that there was no negligence on the part of the gripman, but that there was clearly contributory negligence on the part

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of the young boy. The conclusion which we reach in the case is that the boy rushed out behind a south-bound car immediately in front of the north-bound car, and so close to it that when he unfortunately slipped and fell upon the track it was absolutely impossible for the gripman to check the speed of his car in time to prevent running over him.

The conclusion of the learned trial justice to dismiss the case was therefore correct, and for the reasons given above the judgment and order must be affirmed, with costs.

Section 1187.—Where a general verdict has been rendered special findings to the contrary may be disregarded (*Mixsell, as adm., v. N. Y. & N. H. R. R. Co.*, 27 Civ. Pro., 56; see also 22 Misc., 73-82).

Where the issues have been submitted on appeal they must be disposed of as though they had been determined by the verdict of a jury (*Sullivan v. Metrop. St. R. Co.*, 37 App. Div., 492; 56 N. Y. Suppl., 88; 90 St. Rep., 88; see also *Caspers v. Dry Dock etc. R. R. Co.*, 22 App. Div., 152-158).

Judgment on a general verdict may be order by the Appellate Court where a non-suit has been granted (*True v. Lehigh Valley R. R. Co.*, 22 App. Div., 588-593).

JOHN D. SCHRIEVER *v.* THE BROOKLYN
HEIGHTS RAILROAD.

SUPREME COURT, SPECIAL TERM, KINGS COUNTY.

§ 66.

Attorney's Lien — Application of Section 66, Code Civil Procedure.

An attorney's lien on the cause of action is subject to the right of the parties to compromise and settle. His lien is determined by the amount agreed to be paid in settlement, the same as it would be by obtaining a judgment; and, if the money is all paid over to his client without his consent, the party paying it will never-

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theless be required to pay to the attorney the amount thereof he is entitled to by his lien, if his client refuses to pay him and is irresponsible, the same as if a judgment was paid to the client.

The attorney cannot repudiate a settlement by the parties and prosecute the action for the purpose of trying to get a judgment for more than the amount of the settlement, so as to realize more out of his lien. He is bound by the settlement.

(Decided January, 1900.)

Motion by the plaintiff's attorney to enforce his lien for an agreed contingent compensation after settlement of the action between the parties, by prosecuting the action to judgment, or for other relief. No fraud against the attorney in the settlement was claimed.

Louis L. G. Benedict, for the motion.

Sheehan & Collin, opposed.

GAYNOR, J.—This action was to recover damages for personal injuries. The plaintiff agreed to pay his attorney for his compensation forty per cent. of the amount that should be realized in the action. The defendant and the plaintiff settled the case by the payment of \$350 to the plaintiff. The settlement was made behind the plaintiff's attorney, and without his knowledge. The plaintiff has spent the money and is irresponsible. § 66 of the Code of Civil Procedure gave the plaintiff's attorney a lien on the cause of action for his compensation, and says that "the lien cannot be affected by any settlement between the parties before or after judgment," and that "the court" on petition "may determine and enforce the lien." And it is at last settled that no formal notice of such lien need be given to the opposite party. The statute is itself notice (*Peri v. N. Y. C. R. R.*, 152 N. Y., 521). An attorney's lien is subject, however, to the right of the parties to settle the action. The policy of the law that litigation have an

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end would seem to forbid a contrary suggestion. But, if the money be paid over to the client without the consent of his attorney, and such client is irresponsible, and does not pay the attorney, and the money cannot be reached by the court, the party paying it does so in his own wrong and does not escape the attorney's lien. He must, nevertheless, pay the attorney the amount of his lien. The sum paid in settlement serves as a basis for fixing the amount of the lien, the same as a judgment would. No objection has been made to the form of this proceeding, or request that evidence be taken.

The motion for leave to continue the action is denied, but let an order be taken that the defendant pay to the plaintiff's attorney \$140.

On motion by the defendant for a reargument the following opinion was written:

GAYNOR, J.—This motion for reargument is based on a recent decision of the Appellate Division of this department delivered orally from the bench. I have not ascertained exactly what was decided there, but have reason to say that the question now up was not, nor argued, and I find myself unable to change the views I have heretofore expressed herein and in three other cases this term. If this case is to be appealed it will probably be more acceptable to the learned Appellate Division if I let what I have already done stand.

It was always a thing undoubted that the parties to an action had the absolute right to compromise and settle the case of action as they saw fit, without regard to the advice or wishes of their attorneys. The statute provision (Code Civ. Pro., § 66) giving attorneys a lien on the cause of action for their compensation (instead of only on the judgment for their taxed costs, as at common law), was obviously not

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intended to change this. In answer to a suggestion that the statute was against public policy for enabling attorneys to stand in the way of settlements, which have always been favored by the law, the Court of Appeals, in *Peri v. N. Y. Cent. R. R.*, said: "This criticism overlooks the fact that the existence of the lien does not permit the plaintiff's attorney to stand in the way of settlement. The client is still competent to decide whether he will continue the litigation or agree with his adversary in the way." The same thing was decided in other cases (*Lee v. V. O. Co.*, 126 N. Y., 579; *Poole v. Belcha*, 131 N. Y., 200). In the former of these cases it is said at one place in the opinion, to be sure, that the client may stop the action when he wills, "provided he is willing and able to satisfy his attorney's just claims." But it is obvious from the context that this was not meant as a general reservation to the proposition, but only to come within the precise facts of that case. The learned judge writing did not mean to say, for instance, that if the client was "unwilling" but able to pay his attorney, that a claim could be made by the attorney against the opposite party; for, in case the client is able to pay, the attorney cannot resort to his lien at all against the opposite party, such party being subjected to such lien only as security. No more did he mean to say that an actual settlement between the parties could be set aside by the attorney in any case. How could that be meant after saying that the attorney's lien does not give him the right to stand in the way of a settlement by the parties?

The client having the absolute right of settlement, it must follow that the attorney's lien on the cause of action is subject to such right. The attorney is subject to his client, and his lien to all the prudences, fears, necessities, and so on, of his client, which may induce him to compromise and settle. The cause of action merges in the settle-

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ment. There is then no cause of action left for the attorney's lien to attach to. His lien is determined by the settlement. The amount agreed to be paid in settlement is then all that his lien covers. If nothing is to be paid in settlement his lien is gone. To say that an attorney for the plaintiff can repudiate such settlement and harass the defendant by going on with the action in order to see if he cannot, by obtaining a judgment, create a fund, or a larger fund than the amount agreed to be paid in settlement, for his lien to reach, is equivalent to saying that the defendant cannot settle the cause of action with the plaintiff without the attorney's consent; and that is not so. To give attorneys such a *status* would be to create a licensed band to prey upon the community. It would set afoot champerty and maintenance of a most demoralizing character. The law has not put a learned and honorable profession in such an unworthy position. For instance, one of the three other cases like the present case which came before me this term was an action for damages for the alienation of a wife's affections. Can it be that the attorney for the plaintiff may repudiate the settlement of the parties in such an action and go on and try the action on the speculation of getting a recovery, or a better recovery than the settlement, to serve as a basis for the determination of this lien? It would be strange to say yes to such a scandal after saying the parties have the right to settle the cause of action.

In the present case the defendant having paid the amount fixed by the settlement to the plaintiff, his attorney moved to be allowed to prosecute the action to judgment in aid of his lien. This was denied on the ground that the lien attached to the amount agreed on in settlement; but the defendant now changes its position and wants the plaintiff's attorney to be required to go on with the action rather than pay him forty per cent. of such

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amount to satisfy his lien. It claims that it made the settlement only to buy its peace; but that does not alter the case. Apart from the absurdity of saying it only settled the action to buy its peace, when it knew it was not buying peace at all if the attorney retained the right to go on with the action, how could a settlement for peace put the defendant in any different relation to the plaintiff's attorney than if it settled because it thought the plaintiff had a good cause and would prevail in the action? It does not matter what reasons induced the settlement. The power to destroy the cause of action by a settlement existed in the parties, and they have destroyed it. The attorney did not own any part of the cause of action. Indeed, he could not, for it was non-assignable. He only had a lien on it subject to the right of the parties to compromise and settle from whatever motives might move them. And, on the other hand, if the defendant had retained the attorney's share of the amount of the settlement and tendered it to him, and he had refused it and asked to go on with his action, on no principle could he be permitted to do so.

If the foregoing seems in some respects to run counter to some decided cases, I can only say that after examining all of the cases in England and here, I found the present point neither discussed nor decided in any of them, and myself unable to deduce any rule from them. They are very conflicting and confusing, and, I suppose, I may with propriety say that some of them cannot be deemed authoritative. And, besides, the decisions prior to the adoption of our statute provision giving a lien on the cause of action are not applicable. I understand that the reason and the science and philosophy of the thing should always govern in a judicial decision unless actual authority stands in the way; and I further understand that only the actual thing decided in a case can be cited as an authoritative

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precedent. What may be said by judges in giving a decision is quite another thing. From remarks copied here and there from opinions and text writers any variety of patchwork may be made up. But the law is a science.

There are a few early decisions in England and a number here before the said statute provision giving the attorney a lien on the cause of action was passed (*viz.*, in 1879), to the effect that if the parties made a settlement which was collusive and fraudulent as to the attorney, *viz.*, for being meant to prevent a judgment so that he could not tax his costs (which were formerly fixed by law as his only compensation), he would be permitted to go on and enter judgment in the name of his client so as to tax his costs and thereby protect himself. These decisions are fully discussed in *Coughlin v. N. Y. C. R. R.* (71 N. Y., 443), where it is pointed out that they are based on no principle, but are arbitrary. They grow out of the necessities of the case, to prevent the attorney from being defrauded of his costs. But if he had had a lien on the cause of action as now he would not have needed to enter judgment for his protection. The court could have enforced payment of costs without the aid of such judgment. The settlement itself would have been a basis for the enforcement of his lien. It may possibly be that a case of fraudulent settlement against the attorney could now arise in which he could not get protection unless by prosecuting the action to judgment, but it seems impossible to think of such a case. If the parties should settle ostensibly for \$100, but in fact for \$1,000, in order to defraud the attorney, the latter sum would be the real settlement and would be covered by his lien. How, then, would the fraud be a reason for allowing him to continue the action? The parties have an absolute right of settlement. If they actually settle without anything being paid, that is no fraud on the attorney. If they conceal the true amount, on its

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discovery the attorney's lien attaches to it. There are no longer necessities of the case, as when the attorney had no lien except on the judgment, and then only for the costs fixed by law, which call for a prosecution of the action to judgment for the attorney's protection.

And when we examine the English cases on which this rule of the attorney continuing the action is founded (they are cited in *Coughlin v. N. Y. C. R. R.* and other cases), we find that they have no application except to settlements by the parties which are collusive and fraudulent against the attorney, viz., to prevent him from entering judgment, and thereby cheat him out of the lien for costs which he would have on the entry of judgment. If the settlement had no such purpose it was conclusive. And none of them is authority for the broad proposition that the attorney for the plaintiff may continue any action for unliquidated damages, much less an action for tort, in aid of his lien after a settlement by the parties, even if it be in fraud of him (*Welch v. Hole*, 1 Doug., 237; *Swain v. Senate*, 5 Bos. & Pul., 99; *Chapman v. How*, 1 Taunt., 341; *Cole v. Bennett*, 6 Price, 15; *Marr v. Smith*, 4 B. & A., 466). In *Welch v. Hole* the parties compromised a judgment against the defendant for assault and battery. A motion by the plaintiff's attorney to collect his costs of the defendant by means of the judgment notwithstanding the settlement was denied, for the reason that he had given no notice of lien and that the settlement was not to defraud him. In *Swain v. Senate* (and I have cited these decisions in chronological order), the defendant being in custody under a judgment gave bail and went abroad. The bail bond was a matter of record in the case on which the plaintiff was entitled as of course to enter judgment on a writ of *scire facias*. The plaintiff and the bail entered into a collusive settlement to prevent that from being done, so as to cheat the plaintiff's attorney of his costs. He was

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allowed to enter judgment (which was a mere formality) to frustrate the fraud. In *Chapman v. How* it was held that the plaintiff may without consulting his attorney compromise with the defendant and take upon himself the payment of his attorney's costs "if there be no fraudulent conspiracy to cheat the attorney of his costs;" and the motion to vacate the judgment which the attorney had entered in spite of the settlement was granted. In *Cole v. Bennett* the parties tried to defraud the attorney of his costs, and the motion to vacate the judgment entered by the attorney on default was denied. In *Marr v. Smith* the parties made a *bona fide* settlement of the judgment, and on motion the defendant was discharged from custody under it against the opposition of the plaintiff's attorney, who sought to hold the judgment for his costs. And in *McDonald v. Bailey* (14 Ga., 89), also cited in the *Coughlin* case, it was held that "if the parties without notice *bona fide* settle or compromise the debt and costs, the attorney cannot afterwards proceed against the defendant for his costs." These decisions seem scarcely to support decisions such as that in *Rasquin v. Knickerbocker Co.* (12 Abb. Pr., 324), that the attorney may prosecute the action to judgment in every case, where it has been settled to defraud him, much less the decisions which strangely seem to consider that to be the rule regardless of fraud. This latter never was the law. But at all events such decisions are no longer applicable since the adoption of our statute giving the attorney a lien on the cause of action itself, for the attorney no longer needs a judgment in the action to give him a lien. It was only in order that he might get a lien that he was formerly allowed to enter judgment.

In respect of the objection of the defendant that it is entitled to a jury trial to fix the compensation plaintiff's attorney is entitled to, it is enough to say that the enforcement of his lien is an equitable proceeding and there is

In re Accounting of Carrie Williams.

no right to a jury in equity except by statute.

The motion for reargument is denied, with \$10 costs.

An attorney may not stand in the way of a settlement (*Publishers' Printing Co. v. Gillin Printing Co.*, 25 Civ. Pro., 327).

An attorney's lien is a statutory lien of which all the world must take notice, and any one settling with a plaintiff without the knowledge of his attorney does so at his own risk (*Peri v. N. Y. Cent. & H. R. R.*, 152 N. Y., 521; s. c., 26 Civ. Pro., 279; *Astrand v. Brooklyn Heights R. Co.*, 28 Civ. Pro., 113; *Keeler v. Keeler*, 51 Hun, 505; *Coster v. Ferry Co.*, 5 Civ. Pro., 146; *Affd.*, 98, N. Y., 660).

The lien of an attorney for services may be determined in a summary proceeding (*Matter of Lexington Ave.*, 27 Civ. Pro., 245).

Attorney's lien attaches to counter claim (*West v. Bacon*, 13 App. Div., 371, 373; *Holbert v. Gibbs*, 16 App. Div., 126, 129).

As to prior adjudication in this series on attorney's lien see note 28 Civ. Pro., 116.

Set off.—An attorney has a lien on an undertaking on appeal for services. Held it could not be defeated by a set off (*Bamberger v. Oshinsky*, 21 Misc., 716; 48 N. Y. Supp., 139; see also *Delaney v. Miller*, 84 Hun, 244; *Perry v. Chester*, 53 N. Y., 240; *Dienst v. McCaffrey*, 32 N. Y. Supp., 818; *Ely v. Cooke*, 28 N. Y., 365; *Ennis v. Curry*, 22 Hun, 584).

MATTER OF THE ACCOUNT OF CARRIE WILLIAMS,
AS ADMINISTRATRIX OF GERMAN WILBUR, DE-
CEASED, OF HIS PROCEEDINGS AS TRUSTEE UNDER
THE WILL OF PHILIP SNYDER, DECEASED.

SURROGATE'S COURT, OTSEGO COUNTY, MARCH, 1899.

§ 2606.

Executors and administrators—Jurisdiction—Admissions binding upon his sureties as trustee—Liability of executor as trustee—How ascertained.

The jurisdiction of this court to entertain proceedings for an account of the proceedings of a deceased representative by his administrator and to grant a decree against the representative of

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the second estate comes entirely from section 2606 of the Code of Civil Procedure.

It seems that this court is confined to the exercise of the power directly conferred by statute, and that the administration cannot voluntarily account for a *devastavit* of the estate of the decedent and procure a decree against herself as such administratrix which shall conclude the sureties.

The administrator of the deceased executor or trustee has authority to voluntarily account for such assets of the first estate as has come to his possession. But it does not confer upon the administrator of a deceased executor or trustee power to come into court for the purpose of prosecuting a claim against the estate which he represents and should protect against such claims.

The admissions and declarations shown to have been made by the decedent would have been compellent against him if living, and against his administration if he had died leaving an estate.

An executor cannot be held to hold a fund as trustee until the trust fund has been in some way legally ascertained, identified and separated from the general funds of the estate, and the trustee has entered upon the duties of his office of trustee as distinct and separate from his functions as executor.

(*Decided March, 1900.*)

Proceedings upon a voluntary accounting.

J. Wm. Taylor, for petitioner.

J. W. Tucker, for sureties Lane and Marsh.

BARNUM, Act. Sur.—Philip Snyder died in or about the year 1872, leaving a will which was admitted to probate by the surrogate of this county and letters testamentary thereon issued to German Wilbur, January 11, 1873.

German Wilbur died April 16, 1892, without having filed an inventory of the estate of Philip Snyder. He never rendered an account of his proceedings as such executor nor as trustee, and was never discharged or removed. No decree was ever made by this court in the estate.

December 19, 1896, Carrie Williams, the petitioner in

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this proceeding, was appointed by this court administratrix with the will annexed of Philip Snyder, deceased.

January 30, 1897, the said Carrie Williams was appointed by this court administratrix of the estate of German Wilbur, deceased.

The will of Philip Snyder contained the following provision: Third. "I give and bequeath to my daughter Helen Wright Six Hundred Dollars, but to be kept in trust for her use and benefit by German Wilbur, the said Wilbur first to give proper bail and then to receive for the use and benefit of my said daughter Helen Wright the said Six Hundred Dollars out of my estate and pay or cause to be paid to her, the said Helen, the interest annually on the same for her use and benefit, and in case of sickness or any lack of proper care the said Wilbur shall give to her such part or portion of the Six Hundred Dollars as her needs may require, or if she should disease or die, then the said amount or such portion as may be left is to be divided between her children, to share in equally, and if she should leave no heirs, their sum to be divided between such of my children as are named in this my last Will and Testament."

By a subsequent clause of the will German Wilbur was named as sole executor thereof. No provision was made requiring Wilbur to give security for any part of the estate except the \$600 mentioned in the third clause.

July 5, 1873, German Wilbur filed a bond with Albert Lane and John Marsh as sureties, which was duly approved by the surrogate.

The condition of the bond is, that Wilbur shall faithfully discharge the trust reposed in him as trustee of * * * the goods, chattels and credits of Helen Wright under the will of Philip Snyder, deceased, * * * and also obey all orders of the surrogate of the county of

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Otsego, touching the administration of the estate committed to him * * *.

This is a voluntary proceeding commenced by Carrie Williams for an accounting. The account filed states that the petitioner renders an account of her proceedings as administratrix with the will annexed of Philip Snyder and of the proceedings of German Wilbur, deceased, as executor, and states that it "contains a statement of all facts affecting German Wilbur's and her administration of said estate."

The account contains the following statement, "I charge German Wilbur, as executor, as follows:

" With trust estate as per schedule H.....	\$600 00
" With amount of legacies paid.....	775 00
	\$1,375 00
<i>"Credit.</i>	
" With the amount of Schedule II paid over..	\$775 00
" Leaving a balance.....	\$600 00

Schedule H contained statements, among other things, to the effect that German Wilbur, as executor, received the \$600 trust fund from the estate, as petitioner is informed and believes. That as administrator with the will annexed of Philip Snyder, the petitioner had made diligent inquiry as to the condition of the assets of the estate which passed into the hands of German Wilbur, as executor and testamentary trustee under said will, but had not been able to find any part of the same, nor any part of the trust estate * * *.

That German Wilbur died insolvent, without having accounted for any part of the trust estate * * *. That she is unable to discover any assets of the estate of

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Philip Snyder or of the estate of German Wilbur, as executor and trustee; and that she is unable to discover any property belonging to German Wilbur either individually or as trustee * * *.

That on information and belief, German Wilbur, during his lifetime, had converted the \$600 trust fund to his own use, and at the time of his death would have been unable to have reported any of the same to his credit * * *. That as the administratrix of German Wilbur, deceased, she is unable to report any property or assets belonging to the estate of German Wilbur at the time of his death.

The petitioner seeks to obtain a decree against herself, as administratrix of German Wilbur, adjudging that he received the \$600 trust fund as testamentary trustee, and directing the petitioner, as such administratrix, to pay the same.

§ 2606, under the provisions of which the petitioner seeks the desired relief, provides that, "Where an executor or * * * testamentary trustee dies, the surrogate's court has the same jurisdiction, upon the petition of his successor * * * to compel the executor or administrator of the decedent to account, which it would have against the decedent if his letters had been revoked by a surrogate's decree * * *."

It will be observed that the above-cited provision only provides for a compulsory accounting, and this is a voluntary proceeding.

The section contains the further provision: "And an administrator of a deceased executor * * * or testamentary trustee may voluntarily account for any of the trust property which has come to his possession * * *."

This clause seems to provide only for a voluntary accounting for such trust property as has come to the possession of the accounting party. As no property has come to the possession of the petitioner, I am at a loss to find

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any authority for this proceeding under this provision.

The section also provides that, "With respect to the liability of the sureties in, and for the purpose of maintaining an action upon the decedent's official bond, a decree against his * * * administrator, rendered upon such an accounting has the same effect as if an execution issued upon a surrogate's decree against the property of decedent had been returned unsatisfied during decedent's lifetime * * *."

A decree against the administratrix of German Wilbur herein, if the proceedings are regular and the trial free from reversible error, unless it should be set aside by this court under the provisions of § 2481, would be conclusive against the sureties in an action upon the official bond (*Martin v. Hann*, 33 App. Div., 604; *Douglass v. Ferris*, 138 N. Y., 192; *Altman v. Hofeller*, 152 id., 48).

Before the amendment of 1884, the Surrogate's Court had no power to compel the administrator of a deceased executor to account for his proceedings as such executor.

Prior to that amendment the remedy in case of the death of the executor or trustee was by action in a court of equity (*Trust & Dep. Co. v. Pratt*, 25 Hun, 26; *Williams v. Kiernan*, id. 362; *Haines v. Meyer*, id. 416; *Redfield's Pr. in Surrogate's Courts*, 5th ed., 749).

The section originally provided only for a compulsory accounting. By the amendment of 1891, the clause was added permitting the representative of the deceased * * * executor * * * trustee to voluntarily account for any of the trust property which has come to his possession.

The jurisdiction of this court to entertain proceedings for an account of the proceedings of a deceased representative by his administrator and to grant a decree against the representative of the second estate comes entirely from § 2606.

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It seems to me that this court is confined to the exercise of the power directly conferred by the statute, and that the administratrix of German Wilbur cannot voluntarily account for a *devastavit* of German Wilbur and procure a decree against herself as such administratrix, which shall conclude the sureties.

I think the amendment of 1891 was intended to confer upon the administrator of the deceased executor or trustee authority * * * to voluntarily account for such assets of the first estate as had come to his possession. That it does not confer upon the administrator of a deceased executor or trustee power to come into court for the purpose of prosecuting a claim against the estate which he represents and should protect against unjust claims. Even if he believes the claim to be just, I do not think the amendment gives the administrator power to wield a sword against the estate which he has been designated to protect.

The sureties upon the official bond of German Wilbur were cited herein and appeared by attorney, and among other numerous objections the following appear:

"That the petitioner herein cannot as administratrix or otherwise maintain this proceeding."

"That the petitioner as the personal representative of German Wilbur cannot maintain this proceeding."

It is apparent to me that they did not waive any of the points above suggested; and that they are in position to raise them hereafter as they may be advised.

This matter has been before me once before and was dismissed because I thought that no decree could be made as the matter was then presented which would be decisive of the controversy.

Inasmuch as the matter has been twice presented at considerable expense to the parties, I think it would be

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better for me to express my views upon the facts as presented.

The evidence briefly stated is as follows: May 20, 1863, Philip G. Snyder executed to the defendant, Philip Snyder, a mortgage covering real property situated in the town of Roseboom, in this county, to secure the payment of \$2,800.

March 29, 1873, German Wilbur, as executor of Philip Snyder, deceased, executed an instrument in writing, the material parts of which are the following: "For and in consideration of \$1,819 to me in hand paid by John Marsh of Middlefield, N. Y., the receipt whereof is hereby acknowledged, I, German Wilbur, Executor of the last will and the estate of Philip Snyder, deceased, do hereby sell, assign, transfer and deliver to the said John Marsh the within described mortgage and the bond accompanying the same the lands therein described, and the money due or to grow due thereon * * * and I covenant that there is due or to become due on said mortgage the sum of \$1,819 and that the same is good and collectible and I guarantee the payment of the same." Hannah Wilbur, widow of German Wilbur, testified in substance that her husband told her that he purchased two tombstones for \$50. That she did not know anything about the other funeral expenses. That her husband told her that Philip Snyder was not in debt to any one at the time of his death. That German Wilbur paid her \$200 legacy and about \$20 additional as residuary legatee. That she gained all her knowledge as to the condition of her father's property from her husband after her father's death. That her legacy was paid to her about a year after the death of Philip Snyder.

That German Wilbur told her during the last year of his life that he had had the \$600, but had not then got it and could not pay it. That she knew of German Wilbur paying interest to Helen Wright on the \$600. That the

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receipts signed by Helen Wright to German Wilbur were in his possession at the time of his death.

Elizabeth Hollister testified that German Wilbur paid to her her \$200 legacy and about \$45 as residuary legatee. She did not remember when he paid it to her, but testified that it was paid all at one time, about a year after the death of her father.

Letters testamentary upon the will of Philip Snyder, deceased, were granted to German Wilbur January 11, 1873. The date of the death of Philip Snyder does not appear.

Six receipts were found among the papers of German Wilbur after his death, signed by Helen Wright. Four of them read in substance, as follows: "Received of German Wilbur Executor of the estate of Philip Snyder \$36.00, that being the interest now due."

Two of them read in substance: "Received of German Wilbur Executor of the estate of Philip Snyder \$36, that being the amount of interest due on her trust money."

The receipts bear date in April, 1881, 1884, 1885, 1886, 1888, 1889.

Mrs. Hollister also testified that she knew of Helen Wright receiving interest money from German Wilbur up to about six years before the trial. That she "Took care of the money and would take the money to her and she would sign the receipts and send them back to German Wilbur."

No evidence was offered by the sureties.

The testimony upon which the petitioner seeks to obtain a decree which will compel the sureties to pay the \$600 and interest, consists largely if not entirely of admissions and declarations of German Wilbur.

It may be assumed at the outset that the admissions and declarations shown to have been made by German Wilbur would have been competent against him if living and against his administratrix if he had died leaving an estate.

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A much more serious question arises in determining how far, if at all, the admissions and declarations of German Wilbur can be used as a basis for an adjudication, the only effect of which would be to compel the sureties to pay the amount.

The third clause of the will of Philip Snyder provides that German Wilbur should first give proper bail and then to receive the * * * \$600 out of the testator's estate * * * . He was not required to give "bail" as executor. He could properly have received all the estate as executor prior to giving security. If he received \$1,819 upon the assignment of the mortgage, it was received as executor, several months before the bond was given. I do not think that the bond would relate back to the time of his appointment, or the receipt of the money, in such way as to make the sureties liable for a *devastavit* which occurred before the filing of the bond, nor so as to make the admissions or declarations of German Wilbur prior to that time competent against the sureties.

The reasons which cause the bond of an executor usually to relate back so as to make the sureties upon his bond liable for a conversion of the assets of the estate which occurred before the giving of the bond do not obtain in this case. An executor's bond is designed to cover a prior improper use of the funds of the estate. The bond in question was given to permit German Wilbur to receive money, as trustee, which he could not receive in that capacity before giving the bond. It was given as an indemnity against his wrongful acts subsequent to its execution. I think the bond in question is governed in this respect by the principles which control the bond of a public officer, and that the sureties are not liable for defaults committed before the giving of the bond (*Bissell v. Saxton*, 66 N. Y., 55; *Scofield v. Churchill*, 72 id., 567).

It cannot be presumed under any circumstances appearing herein that German Wilbur had received any money as trustee before the bond was given.

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It was essential to show, in order to recover against the sureties, that Wilbur had assets in his hands, as trustee, during the time for which they were bound (*Kellum v. Clark*, 97 N. Y., 393).

The assignment executed by German Wilbur, as executor, recites a consideration of \$1,819. As against the sureties the question arises whether it is anything beyond an admission of German Wilbur that he had received \$1,819, as executor. If not being an admission made before the bond was given, and as executor, is it competent as against the sureties to establish the fact that German Wilbur received the sum of \$1,819 as executor?

Assuming the evidence sufficient to show that he received, as executor, \$1,819, we will consider the evidence bearing upon the liability of the sureties growing out of its receipt by him.

It is insisted that the payment by the executor to Mrs. Wilbur and Mrs. Hollister of the amount of their legacies, and something additional, as residuary legatees, proves that the estate was more than sufficient to pay all debts, funeral expenses and legacies.

It appears that the payments were made about a year after the death of Philip Snyder, but there is no evidence to show the date of his death, so that we are left without evidence to show whether the legacies were paid before or after the execution of the bond.

At the farthest the payment of the legacies would be no more than an admission by him as executor. It cannot be assumed without evidence that his admissions were made after the bond was given. The admissions of German Wilbur are not competent to bind the sureties unless they are a part of the *res gestae*, and his declarations cannot be regarded as of the *res gestae* unless it appears that they were made after the bond was executed and in the transaction of business relating to the trust estate.

The payments to the legatees were not made in the course of the performance of business, for which the sure-

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ties were bound, and they are not shown to have been made during a period of time following the execution of the bond.

The admissions and declarations of German Wilbur to Mrs. Wilbur to the effect that he had had the \$600 but had not got it then and could not pay it; that Philip Snyder was not in debt to anyone at the time of his death; that he purchased tombstones at an expense of \$50, were not made as a part of any business transaction relating to the estate of Philip Snyder. They were mere narratives of a past transaction. It does not appear that Mrs. Wilbur was interested at that time in the estate of Philip Snyder or the \$600 trust fund. I do not think the evidence is available against the sureties.

Judge Earl said in *Hatch v. Elkins*, 65 N. Y., 496, which was an action upon a bond of indemnity: "In such a case the party holding the indemnity claiming loss against his indemnitor must prove it by evidence competent against him. He cannot prove it by mere admissions or statements of the principal, however formally made. The declarations of the principal made during the transaction of the business for which the surety is bound, so as to become part of the *res gestae* are competent evidence against the surety; but his declarations subsequently made are not competent." The judge quoted from 1 Greenleaf on Evidence, 187, the following, "the surety is considered bound only for the actual conduct of the party, and not for whatever he might say he had done, and therefore is entitled to proof of his conduct by original evidence when it can be had, excluding all declaration of the principal made subsequent to the act to which they relate."

The same principle is recognized in *Kellum v. Clark*, 97 N. Y., 392; 1 Rice Ev., §§ 212, 240; *Tenth Nat. Bank v. Darragh*, 1 Hun, 111; *Moore v. Meacham*, 10 N. Y., 207; *Abbott Tr. Ev.*, 474-513; *Horn v. Perry*, 14 Hun, 411.

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Payment of the interest on the \$600 to Mrs. Wright, standing as it does alone, is not sufficient as an admission by Wilbur to charge the sureties.

The receipts all recite that the payment was made as executor, indicating that they did not regard him to have yet received the fund in the capacity of trustee. If the payment may be regarded as a concession by Wilbur that he had received the trust fund, it furnishes no evidence as to whether he squandered it before or after the execution of the bond.

The evidence is not sufficient to show the condition of the estate of Philip Snyder at the time of his death. No inventory having been filed, and the executor never having rendered an account of his proceedings, it has not and apparently cannot be proven at this late day whether there was any surplus left for legatees after the payment of debts and the expenses of administration.

The persons interested in the trust fund could have compelled German Wilbur to render an account, and if there was a surplus applicable to the payment of the \$600 fund it was within their power to procure a decree to be made directing the executor to pay the same to himself as trustee, and they could thereafter have compelled him from time to time to render an account of the condition of the trust fund.

There is very great doubt whether any liability occurred under the bond in the absence of such judicial proceeding, placing the fund in his hands as trustee.

Wilbur was entitled as executor to receive all the assets of the estate and hold them as such until such time as his accounting should show a fund in his hands properly applicable to the trust fund. If he did not then give a bond the fund could not come to his hands as trustee, and on his failure to give security, his successor could have been appointed, to whom he could have been compelled to pay the money.

Under the circumstances appearing herein, I do not

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think that it can be held that German Wilbur ever received any part of the \$600 as trustee of the property of Helen Wright.

The authorities seem to uniformly hold that an executor cannot be held to hold a fund as trustee until the trust fund has been in some way legally ascertained, identified and separated from the general funds of the estate, and the trustee has entered upon the duties of his office of trustee as distinct and separate from his functions as executor. *Matter Estate of Hood*, 98 N. Y., 369; *Cluff v. Day*, 124 id., 203; *Matter of Underhill*, 35 App. Div., 436; *Johnson v. Lawrence*, 95 N. Y., 165.

Decree dismissing the proceeding ordered.

Proceeding dismissed.

HORACE WASSON ET AL. v. FRANCIS L.
HOFF ET AL.

COUNTY COURT, ERIE COUNTY, MARCH, 1899.

§ 763.

Foreclosure of mortgage—Death of parties—Abatement—When it does not happen—Amendment, when necessary—Form of judgment—After decision—Who bound.

At common law death abated all actions so as to put an end to them and compelled representatives or successors of deceased parties to begin as if the first action had not been instituted.

The language of Section 763 of the Code of Civil Procedure is imperative and no amendment of parties would therefore seem necessary or permissible prior to the rendering of judgment.

The proper manner to enter judgment when a party dies after decision has been rendered and before judgment of sale or other judgment has been entered is in the names of the original parties.

A decree made and entered before death of a party may be executed thereafter notwithstanding the death of the party and binds all persons claiming any interest under such party and where the

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judgment is to be enforced by a sale of the party's interest in the property and not to be enforced *in personam* as in this case, an application to revive is unnecessary.
(Decided March, 1899.)

Motion on behalf of defendants Hoff for an order directing that all proceedings in above-entitled action subsequent to the death of Margaret E. Sherwood be vacated and set aside as irregular, on the ground that Margaret E. Sherwood was dead and her successors in interest had not been made parties to the action.

Charles M. Harrington, for plaintiffs.

Hartzell & Hartzell, for defendant Francis L. Hoff.

O. O. Cottle, for defendant Katharine Hoff.

EMERY, J.—This is a motion made on behalf of the defendants Katharine Hoff and Francis L. Hoff for an order directing that all proceedings in this action subsequent to the death of the defendant Margaret E. Sherwood (which occurred on January 1, 1899), including the appointment of a referee to sell, the allowance of additional costs, entry of judgment and issue and delivery of process to sell, be vacated and set aside as irregular, on the ground that Margaret E. Sherwood was dead and her successors in interest had not been made parties to the action, that the action had abated and had not been revived or continued, and the fee of the mortgaged premises had descended to persons who are not parties to the action, and no notice of said proceedings was given to such successors or the attorneys for the said Francis L. Hoff.

This action was brought by the plaintiffs against Francis L. Hoff, Katherine Hoff and Margaret E. Sherwood as defendants for the foreclosure of a mortgage covering premises situate in the city of Buffalo, Erie county, N. Y. The said defendants Katherine Hoff and Margaret E.

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Sherwood served answers, raising material issues to plaintiffs' complaint. The defendant Margaret E. Sherwood was the owner of the equity of the premises described in the complaint. The action came on for trial, and was tried at a term of the County Court, without a jury, in December, 1898, and a decision adjudicating the rights of the various parties to the action, and determining all the issues raised, was made December 19, 1898, and duly filed in Erie county clerk's office on the 21st day of December, 1898, and on the same day duly served upon O. O. Cottle, Esq., attorney for said answering defendants. The said decision determined that the lien of the plaintiffs' complaint upon the same premises was a good and valid lien, determined the amount of the same, and directed a judgment of foreclosure and sale of the premises described in the complaint, together with other relief, as demanded in the complaint and awarded to the plaintiffs' costs and disbursements. The said decision did not determine the amount of costs and no referee to sell was therein appointed. Motion papers for that purpose were thereafter duly served upon O. O. Cottle, Esq., as attorney for said defendants Katherine Hoff and Margaret E. Sherwood, on December 21, 1898, and the motion so made was argued January 5, 1899, before the court, said O. O. Cottle, Esq., appearing in open court on behalf of said two defendants who had answered, and arguing the same in opposition to said motion; and thereafter and on the 14th day of January, 1899, the said O. O. Cottle, Esq., in behalf of all the defendants, including the said defendant Margaret E. Sherwood, filed exceptions to said decision in Erie county clerk's office and served a copy of the same on the attorney for the plaintiffs.

On January 1, 1899, the said defendant Margaret E. Sherwood died, then being the owner of the fee of said premises. It does not appear who her successors in interest are. No judgment for deficiency was asked for against the defendant Margaret E. Sherwood, and said decree and

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judgment of sale provided for no relief against her except the usual judgment of sale; and so far as she and her successors in interest are concerned, the action is one *in rem*, and not one *in personam*. At common law, death abated all actions, so as to put an end to them and compelled representatives or successors of deceased parties to begin as if the first action had not been instituted. The law at present applicable to this phase of the question, to-wit, the death of the owner of the equity after decision made and on file, is § 763 of the Code of Civil Procedure, which provides, "If either party to an action dies, after an accepted offer to allow judgment to be taken, or after a verdict, report, or decision, or an interlocutory judgment, but before final judgment is entered, the court must enter final judgment, in the names of the original parties; unless the offer, verdict, report or decision, or the interlocutory judgment, is set aside." The language of this section is imperative, and no amendment of parties would, therefore, seem necessary or permissible prior to the rendering of judgment. The decision in this action adjudicated all the rights of the parties, and directed everything that was necessary to be done, except it failed to appoint a referee to sell, and such decision is in reality a decree. It would, therefore, seem that the proper manner to enter judgment where a party dies after decision has been rendered and before the judgment of sale, or other judgment has been entered is in the names of the original parties (*Arents v. Long Island R. R. Co.*, 36 App. Div., 382; *Tuomy v. Dunn*, 77 N. Y., 515; *Long v. Stafford*, 103 id., 274; *Grant v. Griswold*, 21 Hun, 509; *Smith v. Joyce*, 11 Civ. Pro., 257). It is held in the case of *Long v. Stafford*, cited above, that where a party has died after verdict rendered against him, and before judgment, that judgment can be entered in the original name of the party without change, and that the entry of the judgment is a mere formal matter which the court would have ordered without notice. In that case the notice of motion for judg-

ment was served upon the attorney for the deceased party, and after the party had died. The court says that this procedure was at the most irregular, but it does not hold that it was in fact irregular. It avoids deciding that issue, but it will be noted that the judgment there in question was a judgment *in personam*, and one requiring greater care than a judgment such as is entered herein, inasmuch as it would have to be executed against the representatives of the deceased party. In my opinion, the decision in the case at issue had practically the same force and effect, as if a regular judgment of foreclosure and sale, taken by default, had been entered.

A decree made and entered before death of a party may be executed thereafter, notwithstanding the death of the party, and binds all persons claiming any interest under such party, and where the judgment is to be enforced by a sale of the party's interest in the property, and not to be enforced *in personam*, as in this case, an application to revive is unnecessary (*Hays v. Thomas*, 56 N. Y., 521; *Wing v. de la Rionda*, 125 id., 678).

So far as the additional allowance to plaintiffs' attorney for costs, and the appointment of the referee to sell are concerned, the decision had already provided for costs and disbursements, but had not determined the amount of same and it certainly would seem that the court had the authority to determine the amount of the costs to be allowed plaintiffs' attorney and to appoint an officer of the court to sell, in order to carry the decision into effect; but in addition to the foregoing, the motion papers were served upon the counsel for the defendant, Sherwood, while she was living, and such counsel appeared in open court and argued the motion upon its merits, both for Katherine Hoff, one of the moving parties, to set aside said judgment, and also for Margaret E. Sherwood, now deceased. The Code of Civil Procedure (§ 1297) provides that where a party dies and judgment is entered in the name of the original party, the attorney for the party defendant who had died,

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may serve exceptions, notice of appeal, and even procure and serve an undertaking in the name of such party, and that all such acts inure for the benefit of the successors in interest of the deceased. The defendant, Katherine Hoff, appeared by counsel in open court in opposition to the motion for such extra allowance, and the appointment of a referee, and argued said motion, and not having seen fit to avail herself at that time to object to the argument of the motion, and the continuance of the action, has waived, on her part, the right to raise the question of irregularity, and cannot now raise the same on this motion; for if she fails to object to the proceeding on account of the irregularity at the earliest period, and before she takes any other step in the case, it is a waiver. *Strong v. Strong*, 4 Robt. 621; *Low v. Graydon*, 14 Abb. Pr., 443; *Lawrence v. Jones*, 15 id. 110). So, therefore, as far as the defendant, Katherine Hoff, is concerned, she has waived all right to question the judgment by reason of any irregularity in obtaining the same, if any such exists. As to the defendant Francis L. Hoff, it appears he was in default and was not entitled to notice of the motion for the appointment of a referee, or for extra allowance, and the irregularity, if any such existed, did not concern him in any way, as it does not appear from the moving papers that either he or the said Katherine Hoff are the successors in interest of the defendant, Margaret E. Sherwood. The ones aggrieved are the only ones who should be allowed to take advantage of any irregularity.

It would seem, therefore, that the judgment being one for the sale of the premises only, so far as the said Margaret E. Sherwood is concerned, that the action is not abated by her death and no revivor is necessary, and that all proceedings were regular. I am, therefore, of the opinion that the judgment of foreclosure and sale was properly granted on January 5, 1899, and should stand, and that being the case there is no reason why process should not issue to the referee to sell. The case of *Requa v. Holmes*,

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16 N. Y. 193, relied on by the moving party, does not seem to be in point, because the defendant in that case died before interlocutory judgment and before the rights of the parties were determined.

Motion denied, with \$10 costs.

IN THE MATTER OF EMIL J. SMITH, A BANKRUPT.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT
OF NEW YORK.

§§ 1769, 1771, 1772, 1773.

Alimony—Effect of Bankruptcy Act.

A judgment providing for weekly installments of alimony, granted in a suit for separation from bed and board, under the New York Code of Civil Procedure, being always subject to change to fit the circumstances of the parties, cannot as to payments to accrue be liquidated under Section 63b, is therefore not a "fixed liability evidenced by a judgment" within the meaning of Section 63 a (1), and is consequently not a provable debt in bankruptcy. Not being provable, it is, under Section 17, not affected by a bankrupt's discharge.

This is equally true of installments of alimony accrued after the adjudication and before the time of the pending motion.

So, also, both of temporary alimony and counsel fee under Section 1769 of the New York Code and of permanent alimony under Section 1771; but this, on the broad ground that in New York alimony is not a liability to pay, but an obligation to do, measured up in dollars and cents by a competent court, founded not on contract, but on a natural duty, and, therefore, an adjudicated right belonging to the injured wife, which is not a liability in the sense that a husband can be rid of it by his voluntary act in petitioning in bankruptcy.

The English and American Bankruptcy Laws compared, and the cases under them classified and distinguished; the English doctrine that arrears of alimony before bankruptcy is dischargeable held not applicable here.

For these reasons, order previously granted under Section 11, re-

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straining further proceedings in the Supreme Court of New York to punish a husband who failed to pay alimony and counsel fees, vacated.

In re Houston (94 Fed., 119) disapproved; In re Garrett (Fed. Cas., No. 5252) and In re Lachemeyer (Fed. Cas., No. 7966) held not controlling, but their conclusion approved. Memorandum decisions of Judge Brown of the Southern District of New York, in In re Anderson and In re Shepard, dated June 28, 1899 (21 N. Y. Law Journal, 1246), approved.

(Decided August, 1899.)

Messrs. Lansdowne & Moore, for Theresa B. Smith and
W. J. Shields, for the bankrupt, opposed.

WILLIAM H. HOTCHKISS, Esq., Referee.—This is a motion made to vacate an order made by me in July 31, 1899, restraining Theresa B. Smith and Lansdowne & Moore, her attorneys, from further proceedings to punish the bankrupt for contempt in failing to pay alimony *pendente lite* and counsel fees, awarded them by the Supreme Court of New York under § 1769 of the New York Code. Theresa B. Smith, on January 21, 1899, brought an action against the present bankrupt in such court for a separation from bed and board, and on March 1, 1899, the usual order giving her temporary alimony in \$25 a week and to her attorneys \$50 counsel fee was made. On the issue raised by the husband's answer a trial was had, and on July 10, 1899, a judgment of separation from bed and board forever was entered. This judgment also awarded permanent alimony and costs.

Shortly thereafter, the defendant husband being still in arrears \$10 on the temporary alimony and \$10 on the counsel fee, application was made under § 1773 of such Code for an order requiring the husband to show cause why he should not be punished for his failure to make such payments, returnable July 31, 1899. On July 20, 1899, the husband filed a voluntary petition in bankruptcy, was adjudged bankrupt July 22, 1899, and an order of reference was made to me on that day. Thereafter, and on

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July 31, 1899, I granted a temporary restraining order against the contempt proceeding, with a show cause returnable before the district judge at the next regular term, coupled with a direction, on stipulation of the bankrupt's attorney, that a motion might be made to vacate the restraining order at any time on five days' notice. The present motion is made on that direction.

It will be seen that the application to vacate brings up the question whether temporary alimony in arrears at the time of the adjudication, and the accompanying counsel fee, are dischargeable under the peculiar phrasing of the Bankruptcy Law of 1898. On the argument it was stipulated that the present restraining order might also be considered as against a proceeding to punish for contempt in payment of the permanent alimony fixed by the judgment of separation, to the end that the whole question might be determined on one motion. It was conceded on the argument that, under §§ 1769 and 1773 of the Code, and *Brauth v. Brauth* (36 St. Rep., N. Y., 628) costs allowed on the final judgment are both a provable and a dischargeable debt. I make no ruling on that point.

The original restraining order was granted with some misgivings. The bankrupt was not entitled to it under § 11, unless the persons restrained had dischargeable debts; but, by § 7, alimony and counsel fee, neither being within the exceptions there specified, were clearly dischargeable if provable, and alimony had been held by Judge Evans in the District of Kentucky "a fixed liability evidenced by a judgment," and, therefore, under § 63a (1,) provable (*In re Houston*, 94, Fed., 119). At the same time, in two cases, *In re Anderson* and *In re Shepard*, Judge Brown, of the Southern District of New York, had, on June 28, 1899, refused to grant a similar stay, filing therewith the simple memorandum:

"In my judgment, a liability to pay alimony would not be released by a discharge in bankruptcy (§ 11); and no

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stay should, therefore, be granted on its enforcement, except where a preference is sought on assets."

In spite of this, I could not well overlook the fact that Judge Evans was a member of the Congress that passed the present law, thus bringing to his decision a knowledge of the intention of the lawmaking power in enacting § 63a (1) not possessed by Judge Brown. The restraining order was, therefore, granted, with the direction already quoted, that the parties restrained might have a speedy hearing, if on investigation they became convinced that Judge Brown and not Judge Evans was right.

It would be difficult to over-estimate the importance of the question at bar. It goes to the root of things. From time immemorial the injured wife has been awarded what we call alimony, when a court has decreed that she and her husband shall no longer live together. If, in the wiping out of money liabilities authorized by the Bankruptcy Law of 1898, the divorcee—in this of all countries, the nation where the absence of uniform State laws makes divorce little less difficult than marriage, and in effect imposes no penalties on marital infelicity or infidelity than either a hurried trip to another State if the defendant wishes to marry again or a money payment for the support of the wife and children—if in this country the divorced man can through voluntary bankruptcy rid himself of a liability which not only rests on natural obligations, but which in many cases alone prevents the wife and children from becoming public charges, the first act of the coming Congress should be to amend the law in this particular. After a careful study of the question, however, I am convinced that such an amendment is not necessary, and that, if for no other reason, the very nature of alimony takes it out of the strict and literal meaning of the—in this case—somewhat startling words found in § 63a (1).

"Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment * * * absolutely owing at the

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time of the filing of the petition against him, whether then payable or not, &c." When coupled with § 63b:

"Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

The opposing counsel urge many points in support of their respective contentions, which do not seem necessary to a proper disposition of the motion. Counsel for the wife insist that if a discharge of alimony can be obtained through bankruptcy, the act in that particular is unconstitutional as limiting the right inherent in the States to enforce moral and natural duties. Counsel for the husband insists that alimony was originally but a return in kind made to the wife out of her separate property, which under the common law became the husband's on her marriage to him; and that since the Married Women's Acts in this State is a survival merely, and should not be sanctioned. I am unwilling to place the wife's right to support on so shifty a foundation; it rests on the rock of natural duty. Counsel for the husband also urge that the trend of English decision is toward holding alimony, at least that in arrears before bankruptcy, a provable debt and, therefore, dischargeable. Of this, more in detail later. The main, in fact, it may be said, the only proposition here, is:

1. Does either an order for temporary alimony or a judgment for permanent alimony constitute "a fixed liability, evidenced by a judgment" within the meaning of the section already quoted?

The other question is incidental and more easily answered:

II. Is the counsel fee awarded under § 1769 of the Code of Civil Procedure of New York a provable debt within the meaning the same section?

1. When it is observed that nothing like the words found in § 63 (1) occur in any previous bankruptcy stat-

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ute, either here or in England, the unimportance of precedents will be apparent. But three American decisions seem to pass directly on the point at issue. Two of them, *In re Garrett* (Fed. Cas. No. 5252) and *In re Lachemeyer* (Fed. Cas. No. 7966), both of which held alimony not dischargeable, arose under the Law of 1867, whose § 19 contains no clause as broad as the present 63a (1), and whose §§ 33 and 34, like § 17, of the present law, do not accept alimony from the general rule that all provable debts are dischargeable. The Lachemeyer case is much in point on the broad moral question discussed later, but not on the narrower question at present under consideration. No more is the recent case of *Noyes v. Hubbard* (64 Vt., 302), in which in 1892, Chief Judge Ross writing the opinion, the Supreme Court of Vermont held that alimony is not a debt "founded on contract" within the meaning of a statute providing for relief from such debts by a discharge in insolvency. The underscored words are not found in that portion of the Bankruptcy Law, the interpretation of which must determine this controversy. Nor is that class of cases which holds fines and penalties not provable, or even that other class which declares the obligation to support a bastard child not dischargeable in point, and for the same reason. Congress, in § 63a (1), has launched a new problem.

The phrasing of the corresponding sections of the English Bankruptcy Law of 1863, as amended by the Act of 1890, at first blush does not seem to promise much assistance. By § 37, "all debts and liabilities, present or future, certain or contingent, except demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust, to which the debtor is subject at the date of the receiving order (adjudication), are decreed to be debts provable in bankruptcy;" and by § 37 the meaning of "liability" is defined as the obligation to pay money on contract, &c., "as to mode of valuation capable of being ascertained by fixed rules, or as a matter

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of opinion." By § 30, all provable debts not due the crown or certain public officers or grounded in fraud are dischargeable by bankruptcy. Under these sections it was early claimed that alimony, accrued both before and after the receiving order, was dischargeable. Following *Prescott v. Prescott* (20 Law Times [N. S.], 331, [1868]), which was decided under the somewhat different phrasing of § 157 of the Law of 1849, and held that permanent alimony under 29 Vict., chapter 85, was not an annuity which could be valued and proved in bankruptcy: *Ex parte Neal*, *In re Batey* (14 Ch. Div., 579 [1884]), where the opposite doctrine was held when the payment was due by virtue of an agreement between the parties merely sanctioned by the Court: *Linton v. Linton* (15 Q. B. Div., 239 [1885]) holding that future and monthly payments of alimony are not a "debt or liability," within the meaning of § 37 of the Bankruptcy Law of 1888; *In re Hawlins*, *ex parte Hawkins* ([1894] 1 Q. B., 25), which applies the same doctrine to arrears of alimony after the receiving order (adjudication) and before proof, settled much of the controversy. *Linton v. Linton* is unquestionably the leading case in England at this time, and has been repeatedly referred to with approval (compare *In re Henderson*, 20 Q. B. Div., 509; *Ex parte Fryer*, 17 Q. B. Div., 718; *Haddon v. Haddon*, 18 Q. B. Div., 778). Justice Cave, who wrote the opinion below, seems to have decided the question both on the broad principle that the nature of alimony precluded its discharge in bankruptcy, as well as on the narrower ground that, the amount being subject to change at any time, the accruing payments could not be liquidated and proved. In the Court of Appeal, however, the Master of Rolls and Lord Justices Baggally and Bowen, while apparently conscious of the broad moral question at issue, contented themselves with affirming the ruling below on the narrow ground alone. The following remarks are, however, significant:

Brett, Master of the Rolls: "Anything more disgrace-

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ful in a moral point of view than his attempt to do so (the bankruptcy being self-imposed and palpably for the sole purpose of cutting off alimony) cannot be imagined."

Bowen, L. J.: "It appears to me that arrears of alimony are, within the meaning of § 5 of the Debtor's Act of 1869, 'a debt due in pursuance of an order or judgment of a competent Court,' * * * though they do not constitute a debt at law. * * * (But) I think it absurd to say that this obligation (to keep a wife alive) is a 'debt or liability' provable in bankruptcy."

Whether arrears of alimony accrued before the receiving order is dischargeable seems as yet undetermined in England. But in *Linton v. Linton*, Baggally, L. J., says: "Of course, the case is very different with regard to payments which become due before the bankruptcy. And In re Hawkins (*supra*) Vaughn Williams, J., remarks significantly: "It may be that a distinction is properly made between arrears payable before and those payable after the date of the receiving order" (compare *Millen v. Whittenbury*, 1 Camp., 478). Perhaps this view is due to some express provision of the law, as stated of the English Law of 1869 (see the *Lachemeyer* case, *supra*, Judge Choate there citing to that effect, 2 Swab. & Tr., 645). But arrears of alimony before the bankruptcy are certainly not "demands in the nature of unliquidated damages" within the meaning of § 37 of the present English law. I have, however, been unable to find either any decision settling this phase of the question or any clause in the Law of 1883 making such a liability provable. The *dicta* of the decisions are, however, all one way, and the English view must, therefore, be recorded as in favor of discharging alimony which has accrued prior to the bankruptcy.

Without losing sight, however, of the fact that our § 63a (1) is something very different from their § 37, this review of the English cases points clearly to a solution of one phase of the question. In New York, no more than in England, are future installments of alimony a "debt of

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liability." By § 1766 of the Code "the Court may compel the defendant to provide suitably * * for the support of the plaintiff as justice requires, having regard to the circumstances of the respective parties;" and by § 1771 such Court is given power to "annul, vary or modify" its former directions. The bankruptcy court has no control over the amount or methods of collecting alimony. A husband pauper to-day may be a millionaire at the end of a decade. If so, on well-known principles, the divorced wife could apply confidently for an increased alimony. An annuity is one thing. It can be measured. Alimony *in futuro* is something very different, and to attempt to measure it would be as reasonless as would a quest for the verdict of the stars on the question at issue. As to (1) alimony which has accrued since the adjudication, under the principle that the future earnings of a bankrupt become liable to pay future obligations, and certainly as to (2) alimony yet to accrue, it must be held that neither is a "fixed liability evidenced by a judgment," capable of liquidation under § 63b, and that, therefore, neither is either provable or affected by the discharge which the bankrupt seeks.

In what follows much that is said applies equally to alimony to accrue, already held not dischargeable, because not measurable, and to accrued alimony before bankruptcy. The latter is, in one sense, a "fixed liability." While in this case this phase of the controversy might be dismissed with the remark that the accrued alimony at the time of this adjudication was temporary alimony, and, therefore, based on an interlocutory order, and not a judgment (compare *In re Henderson*, 20 Q. B. Div., 509), I prefer, however, to treat the question broadly, and, so far as this county district is concerned, to determine in one case, if possible, the dischargeability of the different kinds of alimony.

In brief, then, what is alimony—a debt or a duty? A vast majority of reported cases in the United States declare it at least not a debt, though they differ materially in de-

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fining just what it is (*Lyon v. Lyon*, 21 Conn., 185 [1851]; *Ex parte Perkins*, 18 Cal., 60; *Menzie v. Anderson*, 65 Ind., 239; *Daniels v. Lindley*, 44 Iowa, 567; *Pain v. Pain*, 80 N. C., 322; *Campbell v. Campbell*, 37 Wis., 216; *Sheafe v. Sheafe*, 36 N. H., 155; *Wightman v. Wightman*, 45 Ill., 165). Most of these cases arose under contempt proceedings, it being claimed that the same were in effect imprisonment for debt. In this the accepted American doctrine seems different from the English, alimony there being held so far a debt as to preclude the process of attachment on failure to pay since imprisonment for debt was abolished (1 Ency. of Laws of Eng., 218; *Linton v. Linton*, *supra*; *Bailey v. Bailey*, 13 Q. B. Div., 855). Certainly, alimony is not so far property that it is assignable (*In re Robinson*, 27 Ch. Div., 160; *Kemster v. Evans*, 81 Wis., 247, and cases therein cited). Nor can it be collected by action, save in a foreign jurisdiction (*Bailey v. Bailey*, *supra*; *Allen v. Allen*, 100 Mass., 373; *Chase v. Chase*, 105 Mass., 385; *Barber v. Barber*, 21 How. [U. S.], 582). It is true that in the latter case and in the Massachusetts cases which follow it, alimony is declared "a judicial debt of record against the husband;" but that this phrase is used merely as defining such a judgment to be the foundation on which another proceeding in a foreign jurisdiction to assert the natural obligation of support must necessarily rest, and not as declaring an alimony judgment as within the rule that a judgment for money is a debt of record in the broad sense, will be seen by comparing these cases with those that go before. Further, *Barber v. Barber* was decided by a divided court, and its doctrine is in New York expressly disclaimed by Judge Pryor in *Wood v. Wood* (7 Misc. [N. Y.], 571, 581).

The New York cases go further than any other. Here alimony is not a debt, nor yet a penalty, but a natural duty judicially reduced to dollars and cents (*Romaine v. Chauncey*, 129 N. Y., 566; *Beach v. Beach*, 29 Hun, 181; *Wetmore v. Wetmore*, 149

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N. Y., 520, 528). As the duty would continue after bankruptcy, and be not affected by it, so, it is thought, should that duty's representative, the obligation to pay money fixed by the judgment, and either accrued or to accrue. In this the local doctrine differs much from that of Kentucky, on which Judge Evans partly bases his decision in the Houston case (see *Tyler v. Tyler*, 99 Ky., 34). In New York at least—and in the absence of controlling authority in the Federal Courts, I am bound by its decisions—alimony is not only not a debt, because not assignable, or suable, or collectible in any way other than by security, sequestration or imprisonment (§ § 1772 and 1773, Code of Civil Procedure), but it is something higher than a mere liability to pay; it is the obligation to support, which, taken on at marriage and continuing through life, has been measured up and temporarily determined by a Court, but which is absolutely inalienable and undischageable, and, save in amount, beyond the control of the courts, except with the consent or on the fault of the wife. Civilization has lifted the wife from the Baconian *status* of a "hostage to fortune" and a "bill of charges." The obligation to support existed then and continues to this day, but now rests on higher grounds. Such an adjudicated right is, therefore, no longer, if it ever was, a mere liability to pay in the sense of § 63a (1); it is a liability to do, reduced, to be sure, to dollars and cents, but only because of the practical impossibility of enforcement otherwise.

I am unwilling to impute to Congress the intention of permitting the husband, of all persons, to rid himself by his voluntary act of a liability so sacred. In seeking the bankruptcy side of the District Court he seeks equity. He will not be allowed to accomplish its opposite. Judge Haight, in *Wetmore v. Wetmore* (*supra*), tersely says: "Equity will not feed the husband and starve the wife." Further, public policy commands the courts to resist the insidious argument which rests on the words of § 63a (1) already quoted. The husband must, so long as able, stand

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between the State and the injured wife, that she may not be a public charge.

In New York, therefore, the English doctrine and that expressed in the Houston case, as to arrears of alimony before adjudication, must be disapproved. It is, perhaps, possible to distinguish these cases by adverting to their view that that kind of alimony is a debt. Certainly, we do not recognize the English doctrine that arrears of alimony is not collectible for more than a year, a doctrine which seems to have some bearing on their view. Certainly, too, in England a bankrupt could not, as here, be a second, a third and successive bankruptcies, make accruing installments also chargeable should it ultimately be held that accrued alimony may be discharged. The courts should at the outset set their faces against a practice so unconscionable and intolerable. I, therefore, hold that alimony accrued before the adjudication, whether temporary or permanent, is not provable, and, therefore, not affected by the bankrupt's discharge.

Counsel fee *pendente lite* comes within the same reasoning. It is not "evidenced by a judgment" (§ 63a [1]), but by an order; nor yet is it "a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt," the wife not being a creditor, and alimony not being a provable debt. But I prefer to take the higher ground. Counsel fee is a part of the law's means to measure alimony. It is incident to a proper ascertainment in money of the husband's duty. It is, therefore, both in law and in principle, neither provable nor dischargeable.

Nor is there any conflict between this view and that previously expressed in *In re Sullivan* (1 Nat. Bkey. Nws., 380). There the question was as to the dischargeability, under § 17, of a debt admittedly provable. A father's claim for damages by reason of the seduction of his daughter does not, in this country, rest on natural grounds, but on the artificial reason that he has been deprived of her

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services. Such damages are not even a penalty, but a mere recompense in money for services of which he has been deprived. In *re Cotton* (Fed. Cas. No. 3269) was decided without any apparent recognition of the peculiar fiction on which the father's judgment rests. There is no parallelism between such a judgment and one for alimony. Nor will there be until the courts shake loose from the fiction of damages for loss of services, and compel compensation in the shape of a fine payable either to the daughter or to the father. Compare, also, § 10 of the English Amendatory Bankruptcy Law of 1890, which specifically provides now, for the first time, that a discharge in bankruptcy shall not release the bankrupt from any liability under a judgment against him in an action for seduction, this positive enactment evidently having been thought necessary to save such judgments from the broad clauses of the Act of 1883 already quoted.

Alimony and counsel fees not being provable, they are not dischargeable, and (§ 11) the restraining order will be vacated, with permission to the bankrupt to move for a review at the coming term of the District Court on three days' notice.

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IN THE MATTER OF THE APPLICATION OF
LAURA LEGGAT TO PUNISH WILLIAM V.
MOLLOY, SHERIFF OF WESTCHESTER
COUNTY, FOR CONTEMPT OF COURT.

SUPREME COURT, APPELLATE DIVISION, SECOND DEPART
MENT, JANUARY TERM, 1900.

§ § 2017, 2019, 2026, 2031.

Discharge of prisoner on habeas corpus—Duty and liability of sheriff.

Where in *Habeas Corpus* proceedings it is judicially determined by a judge having jurisdiction to issue a writ of *Habeas Corpus*, that the prisoner is illegally confined or restrained, such judicial determination protects the sheriff, who, having the prisoner in his custody, discharges him in obedience to such order.

The sheriff, having a prisoner in his custody, is not bound to see that the procedure provided for in the Code in *Habeas Corpus* proceedings is followed, and he is not responsible in discharging the prisoner in obedience to an order of discharge, even if such procedure be not followed or recited in the order (*Bullymore v. Cooper*, 46 N. Y., 236; *Shaffer v. Risely*, 114 N. Y., 23, distinguished).

In *Habeas Corpus* proceedings it is not the province of the sheriff to inquire whether the court, in directing the discharge of the prisoner, has erred in acquiring jurisdiction. While neglect of the formalities provided by the Code may afford grounds for reversing the decision of the judge, it does not subject the sheriff, who acts under the order of the court, to punishment.

(Decided January, 1900.)

Appeal from an order adjudging the Sheriff of Westchester County guilty of contempt of court.

Justice A. B. Cowles (Charles P. Cowles with him on the brief) for appellant.

Jacob Marks for respondent.

WOODWARD, J.—We are of opinion that the learned

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Surrogate erred in reaching the conclusion that the Sheriff of Westchester County, the appellant, was guilty of contempt of court, and that the order appealed from should be reversed. On the 30th day of June, 1899, the petitioner instituted proceedings by an order to show cause before the Surrogate of Westchester County why William V. Molloy, Sheriff of the said county, should not be punished for a civil contempt of court for discharging from the county jail one Susan Slater Weeks. This motion was duly heard, and on the 22d day of August, 1899, the Surrogate handed down an opinion in which he held that the Sheriff had been guilty of a civil contempt of court, and an order was subsequently made and entered adjudging the said William V. Molloy to be guilty of contempt of court, and imposing a fine of \$250. Susan Slater Weeks had been committed to the county jail upon the order of the Surrogate for neglecting or refusing to comply with an order of the court directing the distribution of certain funds which had come into her possession as executrix, etc., of Lauretta Slater, deceased, and the alleged contempt of the appellant consists in having released the said Susan Slater Weeks from custody contrary to the provisions of the order of commitment.

In the view which we take of this question it is not necessary to consider the details of the order of commitment, nor to inquire as to the jurisdiction of the Surrogate, in a proper case, to make the order appealed from. At the time of making the order appealed from the commitment and order of the Surrogate directing the imprisonment of Susan Slater Weeks had been judiciously declared "void upon the face" by a Court of competent jurisdiction. That decision became the law of this case; a judicial discharge of a prisoner upon *habeas corpus* conclusively settles that he was not liable to be held in custody upon the then existing state of facts (McConologue's case, 107 Mass., 154, 171). If the commitment and order of the Surrogate were void upon their face, and this cannot be questioned on this

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appeal, the Sheriff could not be guilty of a civil contempt, for a void commitment is not a commitment at all, but a mere nullity. It is true, of course, that the Sheriff is not called upon to question the commitment of a court of competent jurisdiction, but when this question has been reviewed on *habeas corpus* and it has been judicially determined that the commitment is "void upon the face," there are no authorities in this State which sanction the contention that the Sheriff is guilty of contempt of court in releasing the prisoner. Indeed, the learned Surrogate, in his opinion, says that he has "no doubt that if the writ of *habeas corpus* had been served upon the Sheriff if he had made his return and the order of the County Judge had so recited, and also recited the giving of the notice as required by § 2038, and directed the discharge of the prisoner, the Sheriff would be justified in obeying the order, even though the notice had not been given to those interested in continuing the confinement," but he urges that as the order of the County Judge contained no recitals showing the jurisdiction of the court, it was the duty of the Sheriff to show the existence of facts giving jurisdiction to the County Judge to make the order. The authorities relied upon by the learned Surrogate for this proposition (*Bullymore v. Cooper*, 46 N. Y., 236, and *Shaffer v. Riseley*, 114 N. Y., 23) do not comprehend a matter of this character, and are not in point. Those cases arose under the provisions of the Code of Civil Procedure (chap. 17, title 1, art. 3) for the discharge of an imprisoned judgment debtor from imprisonment, and constituted an exception to the general rule that the writ of *habeas corpus* will not lie to review a final judgment or decree, or execution thereon, of any competent tribunal of civil or criminal jurisdiction, other than in the case of a commitment for any alleged contempt (2 Kent's Commentaries, 29). In those cases the persons imprisoned had been given all the advantages of a trial; all the questions of law had been before the courts as completely as they could be on *habeas corpus*, but con-

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siderations of public policy moved the Legislature to provide that in cases where the imprisonment was not likely to result in advantage to the judgment creditor, the prisoner might be released from custody. To protect the judgment creditor, and to give jurisdiction to the court, it was made necessary by the statute that the petitioner should make a full statement of his resources, upon a sufficient notice to his creditors, &c., and it was held by the courts that, this proceeding being in the nature of a privilege to the judgment debtor, it was incumbent on him to proceed according to the precise provisions of the statute. The judgment debtor had no rights under the law, except as he complied with the provisions of the statute, and it was due to judgment creditors that the sheriff should be held to a strict accountability for the safe custody of those intrusted to his care under the provisions of final judgments, in which all of the rights of the judgment debtor had been fully protected, and he was held to be bound to know, in the absence of the proper recitals in the order of the Court releasing the judgment debtor, that all of the steps necessary to the acquirement of jurisdiction had been taken by the court. The writ of *habeas corpus*, on the other hand is a writ of right (2 Kent's Commentaries, 26); it is designed to give the person in confinement, or who is restrained of his liberty, an immediate opportunity to test the question of law involved in his imprisonment; or, as it is put in some of the State constitutions, the citizen is entitled to the privilege of this writ in the most "free, easy, cheap, expeditious and ample manner, and" says Kent, "the right is equally perfect in those States where such a declaration is wanting" (see *People ex rel. Tweed v. Liscomb*, 60 N. Y., 559). Not only are the courts given absolute jurisdiction, but the court or judge authorized to issue the writ is obliged to comply with the demand for the writ, when properly made, under a penalty of \$1,000 (§ 2020, Code of Civil Procedure). The county judge, being "authorized to perform the duties of a justice of

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the Supreme Court at Chambers," is clearly invested with jurisdiction in *habeas corpus* proceedings (§ 2017, Code of Civ. Pro.), and, having this general jurisdiction of the subject-matter, it is not for the sheriff to inquire whether the County Court has erred in acquiring jurisdiction of the particular case. While the neglect of the formalities pointed out by the statute may afford grounds for reversing the decision of the county judge, it does not, under the rule prevailing in this State, subject the sheriff who acts under the order of the court to punishment at the hands of another tribunal for a contempt of court.

It is urged that the writ was not served upon the sheriff; that he did not make a return in writing, as seems to be required by §2026 of the Code of Civil Procedure, and that the formal order of the court, dismissing the petitioner from custody, was not filed until the day following the release, and that the sheriff acted without authority in taking Susan Slater Weeks from the jail and releasing her from confinement. The undisputed facts appear to be that a petition duly verified was presented at a Trial Term of the County Court held at White Plains on May 29, 1899, setting forth the cause of the imprisonment of Susan Slater Weeks and praying that a writ of *habeas corpus* issue; that the county judge made an order granting the prayer of the petitioner and directing the issuance of a writ of *habeas corpus* forthwith; that thereupon a writ of *habeas corpus* issued in the usual form, directing the sheriff to immediately produce the body of Susan Slater Weeks, together with the cause of her imprisonment, before the county judge; that these papers were all regular and proper in form, and that they were all duly filed in the office of the County Clerk of Westchester County on the 31st day of May, 1899; that on this day, while the court was in session, David H. Hunt, attorney for the petitioner, applied for the discharge of Susan Slater Weeks, under the writ of *habeas corpus*, "and stated to the court that he had served notice on all the attorneys

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interested in her imprisonment and that there was no appearance in opposition thereto;" that thereupon the county judge ordered that Susan Slater Weeks be brought before him, and Deputy Sheriff Moore, who was in attendance on the court, was directed to produce her; that Moore went to the jail, near at hand, obtained Mrs. Weeks, stopped at the sheriff's office and obtained the order of commitment and commitment from Deputy Sheriff Jarvis (the sheriff being absent and knowing nothing of the proceeding until after the discharge of the prisoner), upon stating to Jarvis the direction of the County Judge, returned to the court room, presented Mrs. Weeks at the bar of the court, and delivered to the clerk of the court the said order of commitment and commitment, having written thereon the sheriff's indorsement, "Arrested April 8, 1889;" that soon afterward the county judge stated in open court that the prisoner was discharged; that thereupon the clerk delivered to Deputy Sheriff Moore the order for commitment and commitment with the words indorsed thereon in the handwriting of the county judge, "Discharged May 31, 1899, Smith Lent, County Judge;" that the deputy sheriff then took Mrs. Weeks and the said papers back to the sheriff's office, where the necessary entries were made upon the books, and the prisoner was allowed to depart; that the county judge then made the formal order of discharge in the *habeas corpus* proceeding, which bears date of May 31, 1899, in which it is distinctly stated that the order for commitment and commitment were "void on their face," and that this order was not entered of record with the county clerk until the following day. Whether or not it was necessary to formally serve the writ upon the sheriff, or whether the sheriff should have made a return in writing, or whether, the court having ordered the discharge of the prisoner, it was necessary that she should have been held in custody until the filing of the formal order, does not seem to us very material to be determined on this appeal. At the time this proceeding

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was instituted to punish the appellant for a civil contempt of court there was an order of a court of competent jurisdiction declaring the order for commitment and commitment "void on the face." Until the order was reversed or set aside in some direct proceeding there was no legal commitment of the petitioner, and the right of the surrogate to punish for contempt of court on the part of a sheriff is limited to "disobedience of a *lawful* mandate of the court," or "for a misbehavior in his office or trust," or "for a willful neglect or violation of duty therein." None of these things could be done by the sheriff in respect to the matter if the commitment was void, and it has been judicially determined that it was "void on the face."

But, assuming the surrogate to have had jurisdiction to punish the appellant, we are of opinion that the sheriff was fully protected by the order of the court. The constitution of this State (§ 6, art. 1) provides that no person shall "be deprived of life, liberty or property without due process of law," and by § 4 of the same article it fixes a method by which to make this clause effective by declaring that "the privilege of the writ of *habeas corpus* shall not be suspended," &c. To effectuate the declared purposes of the constitution the Legislature has given to the justices of the Supreme Court and judges of the County Court jurisdiction in *habeas corpus* proceedings, and this jurisdiction is not restricted by any of the provisions of the Code of Civil Procedure in reference to this subject. The sections of the Code of Civil Procedure referred to in the opinion of the learned surrogate do not relate to the jurisdiction for the purpose of limiting it; § 2017 tells what courts and officers shall have jurisdiction; § 2019 tells what the petitioner must do to bring the matter to the attention of the court (which is made necessary by the next section, which prescribes a penalty if the court refuse to issue the writ), and § 2026 tells what the person on whom the writ is served must do. This is not, however, for the benefit of the court, and in nowise modifies his jurisdiction; it is

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for the benefit of the prisoner, to enable him to have the facts before the court, that the question of the lawfulness of his incarceration may be determined. This plainly appears from the provisions of § 2028, which declares that if the person neglects or refuses to make the proper return the court must punish him in the manner pointed out until he complies with the requirement. In the case now before us the proceeding was in a measure informal; the petitioner had complied with all of the provisions necessary to demand the intervention of the court, and the question of what steps were taken to secure her actual presence in the court, or the papers on which she was committed, is not material. The provisions of the Code were for her benefit, for the purpose of testing the legality of the papers under which she was held, and the court having the necessary facts before it, and that court alone having jurisdiction of the *habeas corpus* proceeding, any failure on the part of the sheriff to do his duty in making the return could give the surrogate no right to punish him for contempt in another proceeding.

Section 2031 of the Code of Civil Procedure provides that on the return of the writ the court or judge must immediately "examine into the facts alleged in the return, and into the cause of the imprisonment or restraint of the prisoner, and must make a final order to discharge him therefrom, if no lawful cause for the imprisonment or restraint or of the continuance thereof is shown." It is urged that, as this order was not formally filed until the day following the informal discharge of the prisoner, the discharge was not according to law, and therefore in violation of the mandate of the surrogate. The court or judge in the discharge of his duties is presumed to have acted in accordance with the law, and all that he was required to do was to "make a final order," and this appears to have been done, though for some reason it was not filed until the following day. If the commitment was illegal, the sheriff had no authority to keep the petitioner in confine-

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ment; the final order, which was on file when this proceeding was commenced, declares that the commitment was void upon its face, and we are of opinion that the direction of the court that the prisoner be discharged, evidenced by the memorandum on the original papers, and supported by the formal order bearing date of the same day, was a sufficient warrant for the action of the deputy sheriff, and that the appellant cannot be punished as for a civil contempt because of the release of the petitioner.

This is, we believe, in line with all of the authorities since the decision in the case of *Savacool v. Boughton* (5 Wend., 170), where the rule was laid down that "Where the court issuing the process has general jurisdiction, and the process is regular on its face, the officer is not, though the party may be, affected by an irregularity, the party is liable for the acts done under it; but the officer has a protection by reason of his regular writ." In the carefully considered case of *Lange v. Benedict* (73 N. Y., 12, 33) Judge Folger lays down the proposition that "Where jurisdiction over the subject is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other involved in the case, although upon the correctness of his determination in those particulars, the validity of his judgment may depend." In the later case of *Woolsey v. Morris* (96 N. Y., 311) the court recognizes the rule in the leading case that a "ministerial officer is protected in the execution of a process regular on its face, issued by a court, officer or body having general jurisdiction of the subject-matter, or jurisdiction to issue it under special circumstances, although in fact jurisdiction of the person or subject-matter did not exist in the particular case. The rule is founded in public policy for the protection of public officers charged with the duty of executing process, who generally cannot know, or have not the means of ascertaining, whether the court, body or officer issuing the process had acquired jur-

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isdiction to render the judgment or to institute the proceeding upon which the process is founded."

In *People v. Sturtevant* (9 N. Y., 263), the court say that the principle "is of universal force, that the order or judgment of a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous. The method of correcting error is by appeal and not by disobedience.

* * * We are not called upon to say whether the court decided right or not in granting the injunction, but whether it became their duty to decide that it should be granted or denied." This is exactly the position in which we find ourselves in respect to the matter now before us, and as the court say in the case cited: "If such was their duty, then they had jurisdiction, and their decision, be it correct or erroneous, is the law of the case until it shall be reversed upon appeal, and can only be questioned upon a direct proceeding to review it, and not collaterally." We are only to determine whether the petition before the county judge was sufficient to make it his duty to cause a writ of *habeas corpus* to issue. If it was his duty, then he had jurisdiction, and his decision, whether right or wrong, is the law of this case until it is regularly set aside, and it was the duty of the sheriff to obey the order and to dismiss the petitioner from custody. If the parties interested in the imprisonment were not satisfied with the result of the *habeas corpus* proceeding they were at liberty to take steps to review the decision of the county judge, and a reversal of the order would have brought the petitioner again into the custody of the sheriff, but there is no authority for the surrogate to punish a sheriff for contempt because of his obedience of an order of a court of competent jurisdiction, though that obedience should conflict with the lawful mandate of the surrogate; certainly not, as in the present instance, when that mandate has been judicially declared to be lawful. See, generally, upon this question *Hathaway v. Holmes* (1 Vt., 405), *McConologue's Case* (107 Mass., 154, 170), *Roderigas v. East River Savings*

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Institution (63 N. Y., 460, 474), Porter v. Purdy (29 N. Y., 106, 113), Bovee v. King (11 Hun, 250,) Chegaray v. Jenkins (5 N. Y., 376), Field v. Parker (4 Hun, 342).

The order appealed from should be reversed, with costs and disbursements.

All concur.

Security for Costs. Cannot be required of a non-resident relator (Peo. ex rel James v. Society, etc., Children, 19 Misc., 677).

Contempt. It would seem that where the person to be brought before the Court in these proceedings is a non-resident, failure to produce is not a Contempt of Court.

It was so held in a case where a child was removed out of the jurisdiction (Peo. ex rel Winston v. Winston, 31 App. Div., 121).

EDWARD D. FARRELL, RESPONDENT, v. THE
MANHATTAN ELEVATED RAILWAY AND
THE NEW YORK ELEVATED RAILROAD,
APPELLANTS.

SUPREME COURT, APPELLATE DIVISION.

§ 1022.

Stipulation as to rental damage—Judgment awarding damages for period excluded by stipulation modified, and, as so modified, affirmed—New trial—When granted and what reviewed under Section 1022, Code of Civil Procedure.

Where a plaintiff stipulates that no rental damage will be claimed for a period prior to that when he took title, no damages will be awarded although the plaintiff being in possession of the property during the whole period for which the court had awarded rental damage either as lessee or as owner of the fee and having subsequently acquired the fee before the commencement of the action it would appear that a trespasser would be liable to a person thus in possession for any damages caused to the interest of the plaintiff on the property by reason of such trespass.

Where a judgment is entered upon a decision stating concisely the grounds upon which the issues had been decided and directing

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judgment to be entered thereon under Section 1022 of the Code of Civil Procedure; the Appellate Court has power on appeal to review all questions of fact and law and may grant to either party the judgment which the facts warrant.

A judgment entered upon a decision stating the findings of fact and the conclusions of law separately before the amendment of the code is different from a judgment entered upon a decision provided by Section 1022 of the Code of Civil Procedure as it now exists.

(Decided July, 1899.)

Appeal from judgment entered upon decision of the court at Special Term.

J. Osgood Nichols, for appellant.

Edwin M. Felt, for respondent.

INGRAHAM, J.—The plaintiff's property is Number 73 Bowery, 110 feet north of Canal street, twenty-five feet in width by 110 feet in depth. There is erected upon this lot a five-story building, which was built in 1865, long before the construction of the elevated railroad. The judgment awarded to the plaintiff the sum of \$4,095 for damages sustained in consequence of the maintenance and operation of the elevated railroad from September 21, 1885, six years before the commencement of the action, to May 9, 1898. The judgment enjoins the defendants from maintaining and operating their railroad in front of the plaintiff's premises unless the defendants pay to the plaintiff the further sum of \$4,550. As to the amount of damage awarded, both for the fee and rental, we think the awards were quite moderate, and such as were clearly sustained by the evidence, and there is but one question suggested by the defendants which requires discussion.

It appears from the evidence that in 1865 this property was owned by one Donnelly, and by lease dated September 11, 1865, Donnelly leased the property to one Shears for twenty years and five months from December 1, 1865,

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the tenant to pay the taxes and assessments and to construct a building, at the end of the term the building to be valued and paid for by the lessor; that this lease was assigned to the plaintiff by assignment dated April 19, 1880. The plaintiff testified that he took possession of the premises under this lease and had been in possession thereof since its date. This lease expired on May 1, 1886. It was also proved that by a conveyance dated February 4, 1887, the plaintiff acquired the fee of the leasehold property and that since that time he has been in possession of the property under such conveyance. It would thus appear that from May 1, 1886, to February 4, 1887, a period of nine months and three days, the plaintiff has been in possession of the property without proof of title thereto. The court, in making the award for damages to the plaintiff's property on account of the easements, awarded to the plaintiff the sum of \$4,095 as damages sustained in consequence of the appropriation of the plaintiff's easements by the defendants from September 21, 1885, to May 9, 1898, the date of the trial, and it would thus appear that there was an award for damages during the time which the plaintiff was in possession of the premises without his having proved a conveyance of or title to the property. There is nothing in the record to show that such possession was wrongful, or that it was otherwise than as a tenant in possession of the premises, holding over after the expiration of his lease. In such a case the law implies an agreement to hold for a year on the terms of the prior lease (*Schuyler v. Smith*, 51 N. Y., 309; *Frost v. Akron Iron Co.*, 1 App. Div., 449). The plaintiff thus being in possession of the property during the whole period for which the Court had awarded such rental damage, either as lessee or as owner of the fee, and having subsequently acquired the fee before the commencement of the action, it would appear that a trespasser would be liable to a person thus in possession for any damages caused to the interest of the plaintiff in the property by reason of such

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trespass (*Witmark v. N. Y. Elevated R. R.*, 149 N. Y., 393), and as the evidence is sufficient to justify a finding that the plaintiff did sustain damage in consequence of the trespass to the amount awarded by the court for the period named the judgment might be sustained were it not for a stipulation or statement made by the plaintiff at the opening of the case as to the period for which the plaintiff claimed a right to recover for damages sustained by the trespass. Before any evidence was given, counsel for the plaintiff stated: "I do not ask for rental damages prior to 1887, when we bought the fee;" and the defendants insist that this was a stipulation that no demand would be made for rental damage prior to that time and prevents the plaintiff from recovering for the period from September 21, 1885, down to February 4, 1887, being one year four months and thirteen days. The plaintiff having thus disclaimed any right to recover prior to February 4, 1887, and the parties having presumably acted upon that disclaimer, we think it was improper for the learned trial judge to award any damage for the period prior to February 4, 1887, when the plaintiff acquired the fee of the property.

The defendants insist that for this error we must award a new trial, as no basis exists upon which we can apportion the damage to the property caused by the trespass. The judgment was entered upon a decision stating concisely the grounds upon which the issues had been decided, and directing judgment to be entered thereon under § 1022 of the Code of Civil Procedure. Under that section of the Code this court on appeal has power to review all questions of fact and law, and may grant to either party the judgment which the facts warrant. The decision states that the ground upon which this award was made to the plaintiff was "that by the taking of said easements the plaintiff, from the 21st day of September, 1885, has sustained a loss in the rental value of said premises No. 73 Bowery over and above the value of any and all general

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and special benefit to said premises arising from the construction, maintenance and operation of said elevated railroad in front of them, amounting to the sum of \$4,095 down to the date of trial of this action, to wit, May 9, 1898." We think the court has the power, under the section of the Code before cited, if it should appear that this loss in the rental value was continuous and operated over the whole period in the same ratio, to deduct from the amount awarded for rental value for the whole period the proportionate amount for the period during which the plaintiff had disclaimed any right to recover such rental value, and to modify the judgment in that respect, thus directing the judgment to which, under the evidence, the plaintiff would be entitled.

From the evidence it appears that the injury to the plaintiff's property, in consequence of the trespass, was continuous and operated during the whole period. Nothing appears to show that there was any different injury caused by the trespass during the period for which damages were allowed prior to February 4, 1887. In consequence of this disclaimer the plaintiff was not entitled to recover for the period prior to that time, and, by deducting the proportionate amount which was allowed for the period from September 21, 1885, to February 4, 1887, from the amount awarded to the plaintiff as damages caused by the trespass, the plaintiff will be awarded the judgment to which he was entitled, and no greater judgment will be awarded against the defendants than the facts warrant.

The cases cited by the defendants in which the court has refused to apportion the award made for rental damage, where it appeared that for a portion of the time for which the award was made the plaintiff was not entitled to recover, were all cases where a judgment was awarded upon a decision stating the findings of fact and conclusions of law separately, before the amendment of the Code before referred to, and are not applicable to a judgment entered upon a decision provided by that section of the Code.

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The judgment appealed from should, therefore, be modified by deducting from the amount awarded for the injury to the rental value of the property caused by the trespass the amount of \$443.89, the proportionate amount of the award made for the damage prior to February 4, 1887, and as so modified the judgment should be affirmed, without costs of this appeal.

All concur.

See *Gannon v. McGuire* (30 Civ. Pro., 18-23) and note to same.

IN THE MATTER OF THE APPLICATION OF THE ARMORY BOARD, IN THE CITY AND COUNTY OF NEW YORK, TO ACQUIRE TITLE IN THE NAME OF SAID CITY TO CERTAIN REAL PROPERTY, &C.

SUPREME COURT, SPECIAL TERM, OCTOBER, 1899.

§ 3357 ET SEQ.

Condemnation proceeding—Apportionment of award between owner and lessee.

A trustee to receive rents and profits and pay or apply them to the use of another for life has no power, in the absence of special authority so to do conferred by the instrument creating the trust, to lease real estate, constituting the *corpus* of the trust, for a longer period than the actual duration of the trust estate.

An option in favor of the lessee contained in a lease by trustees for twenty-one years—which trustees have a discretionary power of sale—to purchase the demised premises at a price fixed, at any time during said term, is void, as, in the execution of the power of sale, the law contemplates the exercise of the judgment of the trustees as to the interests of the estate, based upon conditions, including values, existing at the time when the power is to be actually exercised.

In a condemnation proceeding, *Held* that the apportionment of the total award between the owner and a lessee was erroneous, in that it gave to the lessee an amount in excess of the actual value of his estate, the commissioners having proceeded upon the theory that the lease was absolutely for twenty-one years, when, in fact,

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it was subject to being sooner terminated by the termination of the trust estates of the lessors, and, further, having treated an option of the nature above described as valid and given weight to it in determining the proportionate amount of the award to which the lessee was entitled.

(Decided October, 1899.)

Charles N. Harris, for the Armory Board.

Arnold & Greene, for Lucy W. Drexel, trustee, &c.

Gratz Nathan, for George W. Tubbs.

Frank W. Arnold, guardian *ad litem* for Josephine W. Drexel.

BECKMAN, J.—In this proceeding, which was instituted under the Condemnation Law (Code of Civ. Pro., § 3357 *et seq.*), commissioners were duly appointed, and, having made their report, this motion has come on to be heard for the confirmation of the same. While no question is raised with respect to the fairness and sufficiency of the amount at which the commissioners have appraised the property as a whole, a dispute has arisen between the owners and their lessee concerning the justice of the valuation of their respective interests in the property and the apportionment which has been made of the appraised value between them. The appraisal amounts to the sum of \$108,500, of which \$84,159 is awarded to Lucy W. Drexel, as sole acting trustee under the last will and testament of Joseph W. Drexel, deceased, and the balance of said fund, namely, the sum of \$24,341, is awarded to George W. Tubbs, as lessee of the premises under a lease made by the trustees of Joseph W. Drexel. The lease in question bears date the 31st day of December, 1894, and was made between Lucy W. Drexel and William J. Arkell, as executors and trustees under the last will and testament and codicil thereto of Joseph W. Drexel, deceased, on the one part, and George Waite Tubbs on the other part. It demises the property in ques-

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tion to Mr. Tubbs for a term of twenty-one years from the above mentioned date for annual rental of \$2,625, payable in half-yearly payments. The lessee also agrees to pay all taxes and assessments to which the property may become subject during the term demised. It is further provided that upon the last day of the term or other sooner determination of the leasehold estate, the lessee will surrender the premises to the landlord, together with any buildings or structures thereon, which are to revert and belong to the lessors. It may be said in passing that the lease contains no agreement whatsoever on the part of the tenant to erect any improvements upon the property. The lease also contains this somewhat unique provision, which I quote: "And it is further agreed that the parties of the first part, their successors or assigns, will, while this lease remains in force, sell, grant and convey unto the said party of the second part, his executors, administrators or assigns, or to such other person or persons as he or they may designate in writing, the premises above mentioned and described for the sum of one hundred and five thousand (\$105,000) dollars, or one or more of said lots, having a frontage equal to one-seventh of the entire frontage, at the rate of \$15,000 for each lot." This is distinctly characterized in the lease as an option to purchase conferred upon the lessee, for it is stated that "if the party of the second part, his executors, administrators or assigns shall not exercise the option hereby given to him or them to purchase the premises as above described during the said term or sooner determination of the estate hereby demised, then such option shall become and be null and void." If the option be exercised, then the lessee is permitted to pay for the property in cash or by giving a bond and purchase-money mortgage to the lessors for the amount of the purchase money, with interest at the rate of four per cent. per annum, payable semi-annually, payable in five years, but with the privilege of paying the same at any earlier time on giving thirty days' previous notice in writing to

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the mortgagees. In addition to the above provisions, the lease contains the usual covenants in such cases, and some other provisions, which are mere matters of detail, unnecessary to be stated here.

The lessee seems to have entered into possession of the property at the time of the execution of the lease, and has, so far, complied with his obligations under it. No improvements have been erected upon the lots, which are vacant, nor has the option to purchase been exercised. A large amount of testimony has been taken on both sides upon the question of the value of this leasehold estate, which has resulted in the usual irreconcilable opinions of real estate experts; and it may be confessed that the true theory upon which such a valuation should proceed is a nice one and somewhat difficult of determination. But the evidence was given, and the determination of the commissioners was based upon an assumption that the lease itself, and especially the option to purchase which it contains, was free from legal question. It was assumed that so long as the lessee performed his part of the contract the term of twenty-one years which was demised was not subject to any abridgment, except as in the lease expressly provided. It was also assumed that the option to purchase was one which the lessee could exercise at any time during the continuance of the lease, and much importance was attached to this fact. As these assumptions necessarily and most seriously affected the determination of the commissioners, it becomes important to consider whether they were well founded.

The lessors, as trustees, derived whatever power they had to make the lease from the will of Joseph W. Drexel, who died in the month of April, 1888. The cause under which such authority was assumed to exist, briefly stated, contains the following provisions: The testator devises to his executors all of his real estate, except such as is situated in the State of Pennsylvania, thus including the premises in question, in trust, "to rent the same and to

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receive the rents, issues and profits thereof," and after deducting expenses, repairs, taxes and assessments, to pay his wife during her natural life one-third part of the income. The remaining two-thirds of the net income is appropriated for the benefit of testator's children during the continuance of the trust estate thus limited upon the life of his wife, under certain directions with respect thereto to which it is unnecessary to refer. In case of the death of his wife before one or more of the children had attained the age of 21 years, it is provided that in addition to their own shares each child shall receive an equal part of the income (one-third) which had been given to her to be accumulated during such child's minority. Upon the death of the wife, should that event happen after all of the testator's children should have attained the age of 21 years, the testator devises his real estate to his children and the child or children of any deceased child, share and share alike, free and discharged from the trust, *per stirpes* and not *per capita*. There is an alternative provision in the event of the death of the wife before any of the children attained the age of 21 years under which the real estate is devised to testator's children in equal shares as tenants in common in fee simple. In case, however, of the death of the wife, leaving one or more of testator's children her surviving a minor or minors, and another or others of full age, the testator directs that the trust which he had created shall continue until the youngest of said minor children, if there be more than one, or if there be but one, then until such minor child attains the age of 21 years or dies under that age, at which time the trust is to cease and the real estate is to vest in testator's children and the children of any deceased child in equal shares, *per stirpes* and not *per capita*. Immediately following the above limitations is this provision: "But the devise mentioned in this, the third section or paragraph of my last will and testament, I expressly make subject to the execution by my executors of a power hereby delegated to

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them to sell and convey any or all of the said real estate; and, to the end that such power may be duly exercised, I hereby authorize and empower my executors, in their discretion, to sell and convey the said real estate, or any part thereof, to such person or persons as they may deem proper, and at such prices as may appear just and reasonable, and to give good and sufficient deeds to vest title to the same or any part thereof in a purchaser; and such purchaser is hereby exonerated from looking, in any way, to the application of the purchase money paid as consideration for the sale of said real estate or any part thereof; and, if this power of sale shall be exercised, the proceeds of such sale or sales as may be made shall be invested by my executors in good, income-paying securities, and the income therefrom shall be distributed, and, upon the termination of this trust, the principal of such securities shall be disposed of in the same manner as if such sale had not been made."

It will be observed that there is no power expressed in the will which specifically authorizes the trustees to lease the real estate for any specified period. It is true that at the outset, in expressing the terms of the trust estate which the testator created, he directed his executors, as trustees, to rent the trust property and to receive the rents, issues and profits thereof; but he says nothing with respect to the term for which leases may be made, nor is there any other direction given in any way affecting the powers of the trustees in thus dealing with the property. In fact, the provision in this regard amounts to nothing more than is necessarily to be implied in the creation of a trust to receive rents and profits. The duty of receiving rents and profits imports a power to do that which is necessary in order that rents may be realized. In the absence, then, of any specific provision in the will authorizing such a lease as this to be made, the question arises whether the estate and interest of the trustees in the subject-matter of the trust was such that it can be said as a matter of law that

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the lease in question was one which it was competent for them to make.

It will, of course, be observed that the lease by its terms is to continue for a period of twenty-one years, unless sooner terminated by the exercise of the option to purchase. It may well be, therefore, that the trusts created under the will will have expired long before the end of the term demised. The trend of judicial opinion seems to establish the doctrine that in the absence of authority so to do conferred by the instrument constituting the trust, a trustee of such a trust as this has no power to lease real estate for a longer period than the actual duration of the trust estate (*Matter of McCaffrey*, 50 Hun, 371; *Gomez v. Gomez*, 81 Hun, 566; *Same v. Same*, 147 N. Y., 195).

In the case of *McCaffrey* (*supra*) one Perry executed to one Shoudy a deed of a lot of land in trust to receive the rents and profits, and to pay the same to Harriet Perry for her natural life. On the death of the latter the land was to be sold or partitioned, one-third was to be vested in her daughter Annie, her heirs and assigns; another third was to be vested in said trustee in trust, to apply the income to the use of her daughter Helen until she became 21, when the principal was to vest in her in fee; and the remaining third was to vest in the said trustee in trust to apply the income to the use of her daughter Mary during her natural life, and upon her death the principal was to go to the descendants of the latter in fee living at that time. It was further provided that if any of said daughters should die without lawful descendants, the share of the person so dying should go to the other two or the survivor of them, except that any share which would otherwise go to the daughter Mary should go to said trustee for her benefit. Before the death of Harriet Perry the trustee made a lease of the land for a period of five years, with the privilege to the tenant of a renewal for five years more. The first term of five years having expired, the trustee accordingly executed a renewal of the same for

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a period of five years. A little more than a year afterwards Harriet Perry, the *cestui que trust*, died. The question presented by the case cited was whether the lease last made was a valid one, and it was held that upon the termination of the trust the lease terminated with it, upon the ground that the trustee could not lease for a period transcending the limits of the duration of his estate. The cases of *Newcomb v. Keteltas* (19 Barb., 608) and *Greason v. Same* (17 N. Y., 491) were both considered by the court, and for the reasons there given were held to be inapplicable to trusts under the Revised Statutes of the nature of that under consideration.

The same question was under discussion by the court in the case of *Gomez v. Gomez* (*supra*), which was decided in this department. The *McCaffrey* case is cited with approval by Mr. Justice Parker. In his opinion (p. 570) he says: "In *Matter of McCaffrey* (50 Hun, 371), in which it was held that unless expressly authorized by the trust deed a trustee is without power to make leases extending beyond the trust term, and if he attempts it the lease is invalidated by the death of the beneficiary, the *Keteltas* cases (*supra*) are considered and the reason given why they should not be held to be in conflict with the doctrine of that case. The construction which they receive meets with our approval, and, therefore, justifies the omission of their further discussion."

It appears that the lease in the *Gomez* case was one which had been made by the trustees pursuant to some authority to that end conferred in a proceeding in chancery to which all the persons in interest had been made parties, and it was considered by all of the justices taking part in the decision of the case, except President Justice Van Brunt, that in any event the order made by the Court of Chancery precluded the question of the validity of the lease from being raised. The opinion of the presiding justice is placed simply upon the ground that the trustee had no power to make the lease complained of. Upon an

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appeal to the Court of Appeals the judgment below was affirmed (*Gomez v. Gomez*, 147 N. Y., 195), the court there holding unanimously that the proceedings in chancery were conclusive upon the questions involved. At the same time Judge Haight, giving the opinion of the Court (p. 200), states as follows: "The trust created by the deed being for the life of Mrs. Gomez terminated with her death, and with her death the powers of the trustees were, as we have seen, at an end, except to turn over and convey the trust property as directed by the deed. They, therefore, had no power under the deed to thereafter renew leases, or in the leases executed by them to provide for the renewal of leases after her decease." And in support of this proposition he quotes the *McCaffrey* case.

It may be said that the *Gomez* case is not authoritative upon the question under discussion, in view of the position taken by the Court that the order of the Court of Chancery was decisive of the question in that case. Conceding this, the case is still valuable for the opinions expressed by the Judges upon the question and the approval of the *McCaffrey* case which seems to have been given.

The generally accepted theory seems to be that the estate of a trustee to receive rents and profits and to pay or apply the same to the use of another for life is in the nature of an estate for life, subject to the restrictions with respect to alienation prescribed by statute, and that the trustee has no power, in the absence of special provisions contained in the instrument creating the estate, to encumber the interests of those to whom the *corpus* of the trust has been devised in remainder (*Chaplin on Express Trusts and Powers*, 343-344; *Losey v. Stanley*, 147 N. Y., 560).

In the case last cited *Andrews*, Ch. J., referring to the trust there under consideration, says (p. 567): "The estate of the trustee was for the life of James W. Stanley and terminable at his death. The will created two distinct legal estates in the devised property, viz., an estate in the trustee for the life of the beneficiary with the right of

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possession and to receive the rents and profits during the continuance of the trust, and an estate in remainder which became vested on the birth of children, as before stated. The trustee had no power over the estate in remainder except such as may have been given him by the will. He could not sell or incumber it or in any way by his own act alter or effect the interests of the remainder-men unless authorized by the will. The provision of the Statute of Uses and Trusts (1 Rev. St., 729, § 60) declaring that every valid express trust shall vest the whole estate in the trustees, is by settled construction limited to the trust estate, and has no application to future legal estates in lands covered by the trust, to take effect in possession on the termination of the trust. The trustee in the present case had an estate for the life of James W. Stanley, and it was this estate and this only which vested in the trustee (*Stevenson v. Lesley*, 70 N. Y., 512)."

The estate of the trustee of such a trust being of this quality, the rule which limits the power of one holding a legal estate for life to a demise which must terminate with the termination of the life estate logically applies. It may be mentioned in passing, although it does not seem to effect the conclusion to which I have come, that under the Real Property Law (chap. 547, Laws of 1896, § 86) the Court, upon suitable application, has authority to sanction a lease by a trustee for a term exceeding five years, and to confirm any such lease made before the statute took effect. The lease in question was made before either the Real Property Law or the Act of 1895, which preceded it, became a law. Whether the law is unconstitutional, as has been suggested (*Chaplin on Express Trusts and Powers*, p. 346), in so far as it authorizes the sanction of such an incumbrance of the vested interests of those entitled to the property in remainder, I deem it unnecessary to discuss here. It is sufficient to say that no application to the Court for the confirmation of this lease has ever been made.

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From what has been said it seems to follow that the lease in question is subject to defeat by the termination of the trust estates before the expiration of the term demised. This is a contingency which may occur at any time, and, of course, most seriously affects the value of the leasehold estate.

We now come to the consideration of the option to purchase the property which the lease assumes to confer upon the lessee. I have no doubt of the invalidity of this provision. It is true that the will vests in the trustees a discretionary power of sale, but this is a power which is to be exercised when, in the judgment of the trustees, the best interests of the estate warrant it, and such judgment must be based upon conditions, including values, existing at the time when the power is to be exercised. But in the case before us no such judgment or discretion is possible. The trustees have undertaken to bargain it away, and whether the property should be sold or not, when the demand for a conveyance under the option is made, and at what price, other than the minimum fixed in the option, is made to depend entirely upon the judgment and volition of the lessee; and this is to be the condition of things for a period of twenty years. The lessee at any time during that period may call upon the trustees to convey the land to him for the sum mentioned in the option, and according to the lease they would be bound to give him a conveyance upon receipt of that sum, although the property may then be worth twice the amount. It will be observed that even now, according to the appraisal of the commissioners, the land is worth more than the consideration money specified in the option. In no respect can this option be regarded as a contract to sell on the part of the trustees, or as an execution of the power. At best it is merely an agreement that they will exercise the power whenever during the term of twenty-one years they may be requested so to do by the lessee. It is manifest that there is no authority conferred upon them by the will to make such a bargain as this, in-

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volving, as it does, a necessary disregard of the obligations resting upon the trustees before executing the power of sale to exercise a wise discretion in the matter, based upon their untrammelled judgment at the time, as to what the best interests of the beneficiaries under the will may require in the light of conditions then existing. The option is, in my opinion, void and unenforceable, and in valuing the contract should have been disregarded. The interest of the lessee, which the commissioners were called upon to value, is that which is measured by the lease (without the option) for the term therein mentioned, subject to the contingency of the termination of the trust before the expiration of such term, when the lease also will terminate.

I am satisfied that in this view of the lessee's interest the award made to him was based upon an erroneous principle, and was far in excess of the actual value of his estate. The report must, therefore, be set aside and a rehearing ordered, either before the same commissioners or others to be appointed as it may be determined upon the settlement of the order.

Notice order for settlement.

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JOSEPH STERN, APPELLANT RESPONDENT v. EDWARD R. LADEW AND JOSEPH H. LADEW, APPELLANTS-RESPONDENTS.

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, JANUARY TERM, 1900.

§ 829.

Alleged mutual mistake—Accounts stated of completed transactions held binding.

Under options of purchase and sale, providing that defendants would pay "the highest market price" for hides, and "as much for the hides as anybody else," *Held* that the fact that defendants were extensive dealers in hides and that their purchases to a great extent controlled the market price, did not relieve the plaintiff from the obligation of exercising due care to see that he obtained the highest market price, and his failure to exercise such care, and to object to the statements from time to time as rendered, precluded any recovery on his part, and that such testimony under Section 829, Code Civil Procedure, would probably have been excluded.

Whilst an account stated may be impeached and opened for fraud or mistake, the mistake of one of the parties is not sufficient. It must be a mutual mistake, and the burden of establishing it rests upon the party who asserts it, and must be made out by clear and satisfactory proof. He cannot recover without showing that he has not been lacking in any vigilance which the circumstances demanded of him.

The weekly statements rendered by the defendants to the plaintiff of the transactions between them became account stated, and acceptance and retention of the checks in payment bound the plaintiff, even though the market price as stated was less than the sum agreed upon.

Plaintiff could not relieve himself from his obligation of vigilance, either by accepting the statements and payments without examination, or by leaving his business in such condition that they would be accepted, and then be heard to say that no one was authorized in his absence to pass upon their correctness.

(Decided January, 1900.)

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Appeal by defendants from a judgment in favor of plaintiff entered upon the report of a referee.

Plaintiff appeals from so much of the judgment as dismissed his complaint upon the second cause of action for \$444.97.

Samuel Untermeyer, for defendants-appellants.

Jacob Steinhardt for plaintiff-respondent.

HATCH, J.—In the view which we take of this case it is not necessary that we examine in detail the complicated state of facts which surround the dealings between the parties to the action. A brief review of the general features of the case, and of that particular part of the testimony which controls our decision, is all that is essential to a disposition of the case under the rules of law which we deem applicable thereto.

The plaintiff was a wholesale butcher and slaughterer of cattle, had been since 1858, and during the years covering the transactions which were the subject of investigation upon the trial, had on the average killed about 1500 head of cattle weekly, being one of the four largest slaughterers and dealers in hides in the city. He was also a purchaser of fresh hides from other killers in the city, the extent of such purchases running about 150 hides per week. The cattle which he slaughtered were divided into three classes, known to the trade as natives, Texas and Colorados. The natives for the most part were cattle whose hides were free of brands. The Texas and Colorados were branded upon the sides and the buttocks, and were known to the trade as sides and butts. In price the natives were the highest and the Colorados the lowest. The determining fact regulating the price, aside from the quality of the hides themselves, was the presence or absence of brands, the side brand being more damaging than the butt brand. The hides were also subject to other imperfections which

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detracted from their value, occasioned by grubs which were present in the hides during certain seasons of the year, and also by injuries, usually in the form of cuts made by the butcher in removing the hides. As the hides were removed they were salted and placed in what were termed beds, about 800 being placed in a bed. A shingle bed was made by lapping, in manner similar to shingles laid upon a roof, so as to make one side lower than the other. This was for the purpose of removing the moisture from the hides; the pressure excluded the blood and water and decreased the weight of the hides. Another method was to lay them flat in the bed, in which condition they retained more moisture, and consequently weighed more. The hides remained in the beds from ten to fourteen days, when they were removed and sold in the market.

The defendants were dealers in hides, which they purchased from the various killers. The firm was originally composed of Daniel B. Fayerweather, Edward R. Ladew and Harvey S. Ladew. In 1889 Harvey S. died, and Joseph H. succeeded as a member of the firm. In 1890 Fayerweather died, and the business had been conducted by the defendants since that time. There was a market price for hides in the City of New York during all this time, which was made up by the number of hides furnished to the market in New York and Chicago, and was influenced by the number and character of hides offered for sale. There was quite a large number of brokers and dealers in hides in New York. The market price was arrived at to some extent by communication between those who dealt in the article, by reports of sales and prices quoted. No regular public market quotations were introduced in evidence, but proof of such reports was given by at least one broker, and the use made thereof. The published reports offered in evidence were not received. The defendants were much the larger purchasers in the market, taking from seventy-five to eighty per cent. of the output. Their statement of the market price was determined in the manner above stated.

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The plaintiff's first cause of action is based upon a contract which is alleged to have been entered into between the plaintiff and the defendants prior to June 26, 1891, whereby plaintiff was to sell to defendants the hides of the cattle killed by him in his business, to salt them shingled, and dress in a careful manner, the defendants to remove the same from plaintiff's premises, to render to the plaintiff on the last day of each week a statement of the hides so purchased and removed, and promptly to pay for such hides the highest market price, together with an additional sum of 1 cent a pound for shingled hides and an additional sum of 10 cents per hide for those carefully dressed; that subsequently and on June 26th the same was modified by reducing the additional sum which the defendants were to pay for salting and shingling from 1 cent to three-quarters of a cent per pound; that the defendants continued to take plaintiff's output of hides from the date of agreement until about the 27th day of December, 1891; that during this period weekly statements of accounts and payments were made by the defendants and received and accepted by the plaintiff; that on or about December 27th, 1891, the agreement was further modified by providing that the hides were to be salted flat by the plaintiff instead of being shingled, and the additional sum of three-quarters of a cent per pound for shingling and 10 cents per hide for careful dressing was discontinued; that the hides so salted flat were removed in the same manner by the defendants as prior thereto and weekly statements and payments made as theretofore; that since the rendition of such weekly statements the plaintiff discovered them to be mistaken or false and fraudulent in the items thereof, of which fact he was ignorant at the time they were received, and that by reason thereof the plaintiff has not received for his hides as much as he should have received by something over \$15,000.

Plaintiff's second cause of action arose out of the same state of facts as the first, except that it embraced but one weekly statement, that of June 4, 1892, the correctness of

which plaintiff denied, and notified the defendants that he accepted the check accompanying the statement as payment upon account and not in discharge of defendant's indebtedness to him. The complaint was amended upon the trial, but not in such manner as to change the facts as averred therein except as to the amount which the plaintiff claimed to be entitled to recover, which exceeded the sum originally demanded.

After a trial the referee found upon the first cause of action stated in the complaint that the weekly statements were incorrect during the months of October, November and December, 1891, and that the plaintiff was entitled to have the same opened and corrected as prayed for in his complaint on the ground of a mutual mistake of the parties; and as to the second cause of action he found that the complaint should be dismissed. The decision proceeded upon the ground that the defendants, in rendering to the plaintiff the weekly statements of account under the first modification of the agreement as heretofore stated, intended to pay the full market value of his hides; that the plaintiff trusted the defendants and believed that their weekly statements were true; that as matter of fact the amount so paid, which was covered by the weekly statements from October 3 to December 26, 1891, both inclusive, was less than the actual market value of such hides by the sum of \$9,101.77; that the plaintiff was not guilty of negligence or laches and that the defendants were not guilty of any fraud; that the plaintiff was not chargeable with any act or omission which estopped him from asking that the mutual mistake be corrected so that he might receive the fair value of the hides delivered; that the hides delivered after January 1, 1892, were so delivered under a different agreement by which the defendants were to pay the plaintiff for hides salted flat as much as anybody else would pay; that there was no proof of the breach of this agreement, as the weekly statements were rendered by the defendants and weekly payments made for the hides de-

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livered, and that each weekly transaction was independent of every other; that, by accepting and appropriating without objection the payment for each weekly delivery, the plaintiff had concluded himself from disputing its correctness; that there was neither proof of fraud on the part of the defendants nor any proof of mutual mistake; and that it was the business of the plaintiff to find out whether any person would pay more for the hides than the defendants offered or promised to pay.

The basis of the referee's conclusion is, therefore, clearly and sharply defined. His first conclusion proceeds upon the ground that, as the defendants were to pay the highest market price and an additional bonus for shingling, &c., the plaintiff had the right to rely thereon without making any examination of the statements, resting in the belief that the defendants were paying him the highest market price for his hides, and that no duty was imposed upon the plaintiff to make any examination whatever; that the modified agreement under which the defendants were to pay for his hides salted flat as much as anybody else would pay, imposed upon the plaintiff the duty of informing himself whether in fact anybody else was paying more than the defendants tendered as the price under such arrangement.

The defendants appeal from that part of the judgment which directs a recovery against them. The plaintiff appeals from so much of the judgment as dismisses his complaint upon the second cause of action.

In the disposition of this case, therefore, we are brought to consider whether the arrangement which was made authorized the plaintiff to rely solely and entirely upon the statements of the defendants that they were paying him the highest market price for his hides, and, if so, whether any different rule could be applied to the modification of the agreement. In order to dispose of these questions it becomes essential to examine the plaintiff's testimony upon the subject. There was at no time any written contract

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between the parties, and the terms of the agreement rest solely on the statements made by the plaintiff. The arrangement itself was made about 1878 with Mr. Fayerweather. The plaintiff states it in these words: "Mr. Fayerweather said to me, 'If you shingle the hides for me—all your hides which you kill and buy—I will give you the highest market price and 1 cent a pound above the market price for your hides.'" And, further, he adds: "The extra cent a pound was for salting and shingling these hides, and there was also 10 cents extra for every hide which is taken off clear of cuts." Fayerweather was also to send a man to look after the hides and take them away whenever they were ready. It appears, therefore, that the arrangement was made with a man deceased at the time of the trial; and had objection been taken to this testimony it would probably have been excluded under § 829 of the Code of Civil Procedure (*Green v. Edick*, 56 N. Y., 613; *Clift v. Moses*, 112 N. Y., 426). But it having come in without objection, force and effect may be given to it, subject to such care and scrutiny as the conditions require, and by no means extending it in operation. It did not constitute an agreement between the parties and it imposed no liability upon either. Under its terms the predecessors of the defendants were not required to take any hides, nor did it bind the plaintiff to deliver any. It was a mere option, under which neither party assumed liability (*Chicago & G. E. RR. v. Dane*, 43 N. Y., 240; *B. S. Co. v. M. C. R. Co.*, 134 N. Y., 15). If, in terms, it had contained the elements of a contract, it would have been void as being in contravention of the Statute of Frauds. It did not rise to the dignity of a contract. It was a mere business arrangement under which one proposed to buy and the other to sell, under certain conditions. Undoubtedly, when the arrangement became executed the measure of obligation of the executed arrangement was governed by its terms. The measure of obligation which rested on both parties is to be determined by the character of the arrange-

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ment, the acts done under it and the relative positions of the parties. It is entirely clear that the plaintiff, who had then been in the business of slaughtering cattle and selling hides in the City of New York for twenty years, and conducted the same successfully, having a weekly output of 1500 hides, must be presumed to have known the conditions under which the sale of hides was carried on in New York, and to have had the means of informing himself of the market price of such hides, whether they were sold according to a particular classification or whether they were averaged in price as a mixed lot in the beds. Such a condition creates the conclusive presumption that as he had been continuously engaged in the sale of hides for twenty years, he had knowledge of their value. It may be true that the defendants and their predecessors, being extensive dealers in hides in New York, their purchases to a very great extent governed and controlled the market price; but it is equally true that the plaintiff, during the same period of time, had an output of nearly 1500 hides weekly, which he must have sold upon the market, and therefore he must have been presumed equally to know the conditions which fixed the market price, and the market price itself, and possessed the means at any and all times of thus informing himself. It is noticeable also that this arrangement provides not only for the output of the hides removed from the animals which the plaintiff slaughtered, but also embraced hides which the plaintiff might purchase in the market. His testimony upon the subject of the purchase of hides in the market is pertinent and important, and conclusive upon his knowledge. It appears that he purchased from a number of dealers, some in Albany, and quite largely from a Brooklyn concern; his purchases averaging 150 hides a week. Upon this subject he states: "The hides that I bought from the Brooklyn concern I salted and cured myself. * * * I always had paid to the Brooklyn concern the highest price that fresh hides were bringing in the market. * * * The difference between the price for

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fresh hides and the price for salted hides was from 1½ cent to 2 cents a pound. I paid for the fresh hides that I got weekly. Q. Did you fix the price? A. I paid them the highest market price. They left it to me; they were satisfied as long as I paid them the highest market price. * * * There were plenty of other people in the market, and I was guided by what everybody else paid. I kept myself posted upon the price of fresh hides right along. I knew that the price I was paying for them was the highest market price. Q. How did you keep yourself posted as to the price of the fresh hides? A. For instance, Messrs. Schwarzschild & Sulzberger bought hides maybe of a next door neighbor, which kills next door to a man I get my hides from; Schwarzschild & Sulzberger pay 7 cents or 6½ cents, for argument's sake; I had to pay the same price. Messrs. May & Levy buy hides, and so Mr. Eastman was buying hides, and every butcher will find out if Mr. Eastman pays a quarter more than I do; I hear it two days afterwards. I have to pay always the highest price for what I get." This testimony conclusively establishes, if the presumption did not already exist, that during the period of time when the plaintiff was selling his hides to the defendants and their predecessors he had actual knowledge of the market price of hides, and kept himself posted upon that subject. The means which he adopted to inform himself of the market price were precisely the same means which all other dealers in hides, including the defendants, resorted to for the same purpose during the same period. The plaintiff knew the price of fresh hides, and knew the difference between such price and the price of salted or cured hides, whether the same was measured by classification or averaged on bed lots. Indeed, as between the former and the latter, knowledge of one provided knowledge of the other. Knowledge of classification which determined the price must of necessity have determined the average for mixed lots. So that, however the market price of the hides was made up, it is clear that the plaintiff had

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the same means of informing himself of the price, knew how to avail himself of it, had so availed himself in making his purchases; and it was all backed by experience of very large dealings for over twenty years. It is no answer to say that the hides which the plaintiff purchased were in many instances incumbered with the tail, the head and the horns. The testimony disclosed that all these parts of the animal have a market value, and were sold by the plaintiff in the market. So that whether he bought other parts with the hide, or whether he bought the hides clear and distinct, his knowledge of their value was not impaired, and the result was as accurate in one case as it could possibly be in the other. Indeed, it would not have changed such condition had he bought the whole animal, as he would then have known what the meat was worth, what the head and horns were worth and what the tail was worth, as they all had a more or less well defined market value. Nor is plaintiff's knowledge in this respect to be minimized because the dealings were small. This was a relative condition. There were 150 hides a week, and they amounted to a considerable sum. The dealings were small as compared with the large output of the plaintiff. They were also sufficiently large to conclusively establish that to deliver them successfully required as accurate knowledge of market prices as did the dealings with the 1500 head of cattle which the plaintiff slaughtered each week; and, as we have before observed, the method which he adopted to arrive at the market price of these hides was the same method to which resort was had in order to establish the market price of the whole. So that information which enabled him to deal with one clearly enabled him to deal with the other. other.

We must, therefore, regard the plaintiff, for all the purposes of determining this controversy, as possessed of knowledge substantially equal to that possessed by the defendants. Under such circumstances, and under the arrangements, as testified to by him, by which the dealing

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was carried on, the plaintiff could not shelter himself behind a conclusive reliance upon defendants' statement of the market price, and not make use of the equal knowledge which he possessed to determine whether the returned valuation of his hides by the defendants, as given in the weekly statements, represented the highest market price.

Disposition has been made of this case upon the theory that there has been a mutual mistake of parties. We think that upon the testimony it is too clear for argument that the defendants were not mistaken in anything that they did in respect to this market price. It is not disputed that they made the inquiries, or that, based upon such inquiries, they fixed the market value of the plaintiff's hides. It is equally true, as we have seen, that the plaintiff had made examination of the weekly statements; if there was any discrepancy between the highest market price and the price set out in the statements he could immediately have discovered it. It is true that an account stated may be impeached and the account opened and corrected for errors therein, arising either from mistake or fraud (*Manchester Paper Co. v. Moore*, 104 N. Y., 680). In the present case the referee excluded—and we think correctly—any element of fraud in the transaction. It, therefore, rests solely upon mistake, and such mistake must have been mutual. The mistake of one is not sufficient (*Welles v. Yates*, 44 N. Y., 525). It is equally well settled that the burden of establishing such mutual mistake rests upon the party who asserts it, and it must be made out by clear and satisfactory proof (*Southard v. Curley*, 134 N. Y., 148). It is also a familiar rule that the party who asserts the existence of a mistake must show that he has not been lacking in any care or vigilance which the circumstances demand of him. Nor is it required that both parties shall stand upon the same footing in all respects as to knowledge and information, in order to relieve the party of vigilant care for his own interests; if they stand upon a footing of substantial equality, then in the absence

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of fraud each is bound by the terms of the contract and the fulfillment of its obligations (*Stettheimer v. Killip*, 75 N. Y., 283). Applying these rules to this case, we think it clearly appears that the plaintiff was possessed of the same information, or the means of obtaining it, of which the defendants were possessed; and as the latter paid what they deemed to be the highest price, they made no mistake in that regard. As the plaintiff was possessed of the means of informing himself of the prices which the defendants, by their acts, asserted were the highest market prices, and might, by the exercise of reasonable vigilance and care, have informed himself, a case was not made which authorized the Court to find that there was a mutual mistake of the parties. The contract in terms provides that a settlement of the account shall be made at the expiration of each week. The statements which were rendered by the defendants to the plaintiff constituted an account stated of the weekly transactions between the parties; and as the parties dealt in respect to the subject matter, both as to kind and quality of hides and market price, upon a basis of substantial equality, such accounts become accounts stated, and the acceptance and retention of the check made a completed transaction and bound the plaintiff in accordance with its terms, even though in fact the market price as stated was less than the sum agreed upon (*Nassoioy v. Tomlinson*, 148 N. Y., 326; *Logan v. Davidson*, 18 App. Div., 353). In this regard we are unable to concur with the views of the learned referee in disposing of this case. He seems to have considered the payment of the "highest market price" stated in the first arrangement, and "as much as anybody else would pay" for the hides, as stated in the modified contract, created a condition for the application of distinct and antagonistic principles. We are not able to see any distinction between the obligation imposed on the plaintiff to give some care to the subject of whether he was receiving the highest prices paid by anybody else, and whether he was receiving the highest market price. In

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order to determine the latter, substantially the same steps would be required as to inform himself of the former. Indeed, the condition of the modified agreement was but another form of stating the market price. It would be quite doubtful, if the plaintiff sought to enforce the latter contract upon the basis of demanding what was paid to another seller under exceptional circumstances, whether he could do so, because the fair and reasonable intendment of such language would be that he should receive as much as anybody else for a similar commodity under similar circumstances; and this would be only another way of stating that he was to receive the highest market price. He could no more sit passively and make no inquiry in the one case than he could in another. The market price of the article was equally to be determined by inquiry and from actual transactions. What was the highest sum paid to anyone else would be discovered by inquiry and actual transactions. We should readily agree with the claim of the plaintiff that if he was entitled to recover under his first cause of action he was equally entitled to recover on his second, as we believe that no sound distinction can be drawn between the phraseology used upon each of the two occasions. It is said that the plaintiff was excused from examining these reports for the reason that he was absent from the city during the period for which the recovery was had. His testimony is not entirely clear as to the length of time he was absent. He states that his wife died on July 20th, and follows that by the statement that he was absent from his business about three months. If this absence dated from the 20th of July, then he would have returned by the 20th of October. But assuming that he was absent from his business during the whole period between October and December 26, 1891, we are of opinion that the result would not be changed. During his absence the business was under the management of his brother-in-law. It was continued without interruption, and so far as concerned persons dealing therewith no information was given to them that in

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all branches the business was not being conducted in precisely the same manner as when the plaintiff was present. He testified that he was the only man who had to do with the purchase and price of hides, and that no one else was competent or charged with the duty of making examination of the statements in that connection. It is to be borne in mind, however, that this contract or arrangement, whatever it be called, was terminable at the will of either party. When the defendants made their weekly statements, accompanied by checks, as they then determined the price they were willing to pay, the plaintiff became required to either accept or reject it. *Non constat*, had the plaintiff at any time objected to these statements and payments, the defendants would have exercised their right to terminate the contract and refused to pay more. It did not lie with the plaintiff to abandon his business on account of any conditions, accept these weekly statements and receive pay thereunder, and then avoid their force and effect by the claim that he did not examine them and that he furnished no person who was competent to do so. The obligation assumed by this arrangement was a mutual obligation. The dealings were to be settled each week. Either party, if dissatisfied for any cause, at the expiration of that period could terminate all relations. Under such circumstances we do not think the plaintiff could create a condition where he could remain passive, exercising neither vigilance nor care, accept money in payment for hides delivered, and then, long afterward, have the account opened and surcharged in a large amount, as has been done in this case. Had objection been made, the defendants might well have insisted that they would pay no more and bring the arrangement to an end; and we think it would be an unjust rule to permit the party to accept without objection and thereafter charge the defendants with a liability which they would never have been willing to assume. We think that nothing short of actual fraud could have the effect of avoiding what was an open transaction wherein the defects,

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if any, could have been discovered by the exercise of care. This care the plaintiff was bound to exercise, and could not relieve himself from such obligation either by accepting the statements and payments without examination or by leaving his business in such shape that the statements and payments would be accepted, and then be heard to say that no one was authorized to make an examination or pass upon the correctness of the statements and the payments under them. For these reasons we are of opinion that the judgment may not be sustained,

The judgment should be reversed and a new trial granted.

All concur.

SIGMUND M. MUNDT, AS ADMINISTRATOR *de bonis non*
OF MARTIN M. MUNDT, DECEASED, RESPONDENT,
v. GERTRUDE GLOKNER, APPELLANT.

COURT OF APPEALS, NOVEMBER TERM, 1899.

§ § 1902, 1905.

*Jurisdiction of Court of Appeals—Stipulation for judgment absolute
essential for jurisdiction of appeal from order
granting new trial.*

The Court of Appeals has no jurisdiction to entertain an appeal from an order of the Appellate Division granting a new trial unless the notice of appeal stipulates for judgment absolute in case of affirmance, even though leave to appeal be granted by the Appellate Division and the order granting the application contain a certificate stating that a question of law was involved which should be reviewed in the Court of Appeals.

Actions which survive for the benefit of the next of kin are based wholly upon the provisions of the statute. Sections 1902, 1905, Code of Civil Procedure.

(Decided November, 1899.)

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Marshall B. Clarke, for appellant.*Alfred Steckler*, for respondent.

O'BRIEN, J.—This action was originally brought by a father, as the administrator of his deceased son, to recover damages growing out of the death of the son, caused, as alleged, by the negligent act of the defendant. It is alleged in the complaint that the defendant, being a druggist and pharmacist, doing business in the city of New York, was applied to by the son on the 25th day of June, 1892, to sell to him ten grains of quinine; that thereupon she sold and delivered to him a package purporting to contain quinine and was so marked, but that in consequence of the carelessness and neglect of the defendant, her agent, servant or employee in the management of the business, instead of delivering to him ten grains of quinine, there was delivered to him ten grains of morphine; that the son intended to purchase quinine as a medicine; and, supposing that the article had been delivered to him, swallowed the contents of the package delivered to him, or a portion thereof, which produced his death.

Edward M. Mundt, the original plaintiff and administrator, was the sole next of kin of the deceased, and he died on the 22d of May, 1895, before the trial of the action. Thereupon the present plaintiff, as administrator *de bonis non* of the deceased son, was substituted in place of the administrator. At the trial, when it appeared that the administrator and sole next of kin of the deceased's son had died subsequent to the commencement of the action, the defendant's counsel moved that the complaint be dismissed on the ground that the action had abated by reason of the death of the only party for whose benefit the statute authorized a recovery of damages. The Trial Court granted the motion and the complaint was dismissed. The administrator *de bonis non* appealed from the judgment dismissing the complaint to the Appellate Division, and the

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judgment of the Trial Court was reversed and a new trial granted. The defendant has appealed to this Court from the order reversing the judgment and granting a new trial, but the notice of appeal does not stipulate for judgment absolute in case of affirmance.

On the argument in this Court the counsel for the administrator *de bonis non* moved to dismiss the appeal on the ground that the Court had no jurisdiction. It appears, however, from the record that, prior to the service of the notice of appeal to this Court, the defendant applied to the Appellate Division for leave to appeal, and his application was granted by that Court, and the order granting the application contains a certificate stating that a question of law was involved in the case which should be reviewed in this Court. The question of law stated was, in substance, whether the action abated upon the death of the father and sole next of kin of the person whose death, it is alleged, was produced by the negligent act of the defendant.

Actions of this character are based wholly upon the provisions of the statute (Code Civ. Pro., § § 1902, 1905), where it is provided that the damages recovered in the action are exclusively for the benefit of the decedent's husband, or wife, or next of kin. It seems that the deceased son was unmarried, and, hence, it was argued that, after the death of his father, there was no one surviving who was entitled to damages in consequence of his death.

The question certified, and which is clearly involved in the case, is undoubtedly an interesting one; but since we have arrived at the conclusion that we have no jurisdiction of the case, we refrain from discussing it. The jurisdiction of this Court is limited by the Constitution to questions of law. The question must arise, in all appeals given as matter of right, either upon a review of a final judgment or a final order in a special proceeding, or an order granting a new trial upon exceptions. This court never had jurisdiction to review an order granting a new trial except in conjunction with a stipulation for judgment

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absolute. That was for the plain reason that the order granting a new trial cannot be in any sense a final judgment, and in many cases determines nothing concerning the real legal merits of the controversy. Hence, it has long been the practice, embodied in the statute, to require a party who seeks to review in this court an order granting a new trial, to accompany his notice of appeal with a stipulation that, in case he fails to succeed, an absolute judgment shall be rendered against him. The jurisdiction of this court is expressed in § 9 of article 6 of the present constitution, which went into effect on the 1st of January, 1895. The language of the section is as follows: "Except where the judgment is of death, appeals may be taken, as of right, to said court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them." It will be seen from this language that the jurisdiction of this court is restricted to final judgments in actions, and to two classes of orders therein specified. One is a final order in a special proceeding, which is not at all involved in this case. The other class of orders which we may review are described in the constitution as orders "granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them." Therefore, one of the conditions upon which the jurisdiction of this court depends, when an order granting a new trial is appealed from, is that the appellant shall stipulate that upon affirmance judgment absolute shall be rendered against him. The Legislature cannot dispense with this condition, since it cannot enlarge the jurisdiction of this court in that respect, though it may further restrict it.

The learned counsel for the defendant contends that, inasmuch as the Appellate Division has allowed an appeal

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in the case, and has certified to us a question to be determined, this court has thus acquired jurisdiction of the case. But that, I think, is a mistake. It is true that, in the same section of the constitution already quoted, it is provided that "the Appellate Division, in any department, may, however, allow an appeal upon any question of law which, in its opinion, ought to be reviewed by the Court of Appeals." That provision must be read with the other already quoted. When the whole section is read together, the meaning is that in those cases where a party is not permitted to appeal to this court as matter of right, he may procure an allowance of the appeal from the Appellate Division. But it does not permit an appeal to this court from an order granting a new trial, except upon the condition specified in the section; that is to say, a stipulation for judgment absolute. The construction which the learned counsel for the defendant has put upon the provision empowering the Appellate Division to allow appeals would enable the courts below to dispense with the necessity for a stipulation for judgment absolute in all cases where an order granting a new trial is sought to be reviewed. In other words, it would make the right to appeal from that class of orders depend not upon the condition which the constitution prescribes, that is to say, a stipulation for judgment absolute, but upon the views of the Appellate Divisions in every part of the State with respect to the question whether there was involved in the case a question of law which ought to be reviewed.

The correct construction of the constitution and the statute which follows it, is that certain specified appeals may be made to this court as matter of right. Certain other appeals, not given as matter of right, may be sent here on the certificate of the court below, but that court has no power to allow an appeal, given as matter of right upon certain conditions, by dispensing with the conditions. Every provision of the constitution and the statute should be given effect, according to the intention of the lawmakers

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and that clause of the section permitting the Appellate Division to allow appeals can have full scope and operation by limiting it to cases where the appeal is not given as the defendant and their predecessors had actual knowledge of right. In this way effect is given to both provisions. It was not intended by the provision allowing the courts below to certify cases here to permit appeals from orders granting new trials without any stipulation for judgment absolute. That would open the door for appeals from judgments or orders not final to an extent, and upon conditions not existing before.

There is no reason for believing that the framers of the constitution intended to enlarge the right to review in this court orders granting new trials. On the contrary, the fair construction of the language employed indicates quite clearly an intention to confine such appeals within the old limits, and subject to the conditions always imposed upon a party desiring to be heard here on appeal from an order directing another trial.

When the judgment for the defendant in this case was reversed and a new trial granted two courses were open to counsel. He could go back to the trial court and retry the whole case, and, if final judgment was rendered against him, he could review any error of law in this court. Or, he could appeal directly to this court upon giving the stipulation which the constitution and the statute require. The Appellate Division had no power to dispense with this condition, and it did not in terms attempt to.

The appeal should, therefore, be dismissed, with costs.

All concur.

Appeal dismissed.

Next of Kin. Who they are—Determined from the time of the death (*Mundt v. Glokner*, 26 App. Div., 123; S. C. 27 Civ. Pro., 120).

As to the meaning of "next of kin" as used in these sections defined by Section 1870, Code of Civil Procedure.

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GEORGE H. MILLER, AS TRUSTEE, &C., v.
FRANCESCO RICCI ET AL.

NEW YORK SUPREME COURT, SPECIAL TERM, PART IV.,
AUGUST, 1899.

§. 2733.

Construction of will—Provision requiring deduction for advancement to testator's daughter in antenuptial agreement.

When a will provides for the deduction of an advancement in the final division of the estate, although it was made prior to the will as an antenuptial settlement and in such agreement an apparently different distribution provided for upon the happening of certain contingencies.

Held that the general scheme of the testator must be effectuated and a diversion of words made to accomplish that result.

Held that the construction is favored which permits participation of descendants.

Held that the testator did not expect his residuary estate to be increased by relief from the antenuptial agreement.

Held that the testator regarded that sum as gone forever and hence provided for its deduction from the share of the one who received it (Section 2733, Code of Civil Procedure).

(Decided August, 1899.)

Julien T. Davies and Charles Francis Stone, for plaintiff and executors.

Leavitt J. Hunt, for Julia Miller et al.

F. F. Coudert, Jr., and Charles Frederick Adams, for defendant Ricci.

RUSSELL, J.—The interest of the defendant Francesco Ricci, as executor and sole legatee under the will of his deceased wife, Emma Ricci, is the subject of contention in this action for the construction of the last will and tes-

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tament of Edmund H. Miller, the deceased father of Mrs. Ricci. Shall the sum of \$34,000, the income of which Mrs Ricci enjoyed during her married life, until her death, as provided by her father under the antenuptial agreement made in view of the proposed marriage to the defendant Francesco Ricci, but the principal of which she never received, be carved out of her share given by the will of her father, Edmund H. Miller, so that this sum shall go into the residuary, and pass to her husband through herself, her sisters and brothers, or does it belong to the defendant Francesco Ricci, the surviving husband of Emma Ricci, deceased, under the will she made leaving him the executor and sole legatee?

The testator, after giving an annuity of \$500 to his sister, devised and bequeathed one-half of the residue to his executors for the use of his widow for life, and, upon her death, for division among his five children, of whom the deceased, Emma Ricci, was one, and to the lawful issue of each who may have died leaving issue. The other half of his residuary estate he left to his five children, subject to the provisions in regard to Emma Ricci and Gertrude (Mrs. Mac Gilly Cuddy). Then follows the fourth clause in the will, which is as follows:

Fourth. I having, upon the marriage of my daughter Emma, settled upon her and her issue the sum of \$34,000, for which I have given to her husband, Francesco Ricci, my obligation which is enforceable against my estate at Ringwood, New Jersey; and I having, upon the marriage of my daughter Gertrude Laura to Denis Charles Mac Gilly Cuddy, settled upon her and her issue the sum of £6,000, which I deem equivalent to \$30,000, which fund I have paid to trustees for her benefit, it is my will that the said sum of \$34,000 be charged to my said daughter Emma, and that the said sum of \$30,000 be charged to my daughter Gertrude Laura on the division of my estate, as so much advanced to my said two daughters respectively, on account of their respective shares.

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If their or either of their shares of the one half of my estate directed to be divided on my decease, shall not be sufficient to discharge or equalize all of said advancements, then I direct that the deficiency, with interest from the time of my decease, be charged against their shares of the property directed to be divided on the death of their mother or against the share of the one who shall be deficient.

No reclamation is to be made against my said daughter Emma, or my said daughter Gertrude Laura, in case her share of my estate should prove insufficient to cover said advancement, but until respective shares reach an amount sufficient to cover the same they are not to participate in my estate, but the whole is to be divided among my other children and their issue as before directed; and if the shares of my said two daughters exceed in value the sums so charged against them respectively, they are to receive only the surplus necessary to make them equal with my other children and the issue of either of them who may have died."

This will was executed by Edmund H. Miller, the father, on the 17th day of August, 1883, four years prior to his death. On the 15th day of October, 1877, nearly six years prior to the making of the will, in anticipation of the marriage about to be consummated between the daughter Emma and the defendant Francesco Ricci, of Rome, Italy, an antenuptial agreement was made between the deceased, Edmund H. Miller, his son George H. Miller, the present plaintiff, the daughter Emma Miller and the defendant Francesco Ricci, by which the father agreed to pay to the trustee \$2,380 per annum, in equal quarterly or monthly payments, for her separate use, free from the control of her husband, and, to secure the payment of such sum, the father acknowledged himself indebted to the trustee in the principal sum of \$34,000, secured in the agreement by a mortgage deed on New Jersey real estate, with a provision that, at the time of the

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death of Emma, the principal sum should be divided among her living issue, according to the laws of the State of New York in case of intestacy, unless Emma divided it differently among her issue by her will. And it was farther provided that should Emma die without leaving living issue, the principal sum should not be payable, and should revert to the father or his estate.

Emma died childless in 1897, ten years later than the death of her father, and left by her will all her property to the defendant Francesco Ricci, her husband. All proper distribution of the estate of the father has been made with the exception of this sum of \$34,000. Did the testator intend that this principal sum should be taken out of Emma's part as an absolute advancement, or only in the contingency that he or his estate had to pay that sum under the antenuptial agreement?

The theory of the parties to this litigation, with the exception of the Italian husband, defendant, is that the language of the will absolutely deducts the sum of \$34,000 from the share of personality which Emma was to receive, and that the testator had the right to consider his agreement to pay that sum even in case Emma died leaving no issue, with the burden of the income of \$2,380 per year during her life, an advancement equal in value to the principal sum of \$34,000, whether that principal sum ever had to be paid by him or his estate or not.

There is no doubt but that it was in the power of the testator to determine for himself how he should divide his property among his five children, and whether he would make any difference as against either of his daughters who had married foreign husbands. Therefore, the only question we have to solve is the inquiry as to what the real intention of the testator was. The general scheme of the testator must be effectuated and a diversion of words made to accomplish that result (*Roe v. Vingut*, 117 N. Y., 204). The language must be subordinated to the inten-

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tion (*Phillips v. Davies*, 92 N. Y., 199; *Colby v. Doty*, 158 N. Y., 323).

At the time he made the will, his daughter being married but a few years, the probability of her leaving children was evidently present in his mind. In that event the obligation which he had given compelled the payment of the principal sum by him, or his estate, at her death to those surviving children. He evidently regarded this obligation as so certain, either on account of the probability of her having issue surviving her, or because of his forgetfulness of the precise term of the antenuptial contract, that he referred to it as a settlement upon her and her issue of the sum of \$34,000, for which he had given her husband, Francesco Ricci, his obligation, enforceable against his estate at Ringwood, New Jersey, and, in equivalent terms, refers to his daughter Gertrude Laura, saying that he had settled upon her and her issue the sum of £6,000, paid to trustees for her benefit, and directs that the sum of \$34,000 be charged to Emma and \$30,000 to Gertrude Laura, on the division of his estate, as so much advanced to them respectively on account of their respective shares. He divides one-half of his residuary estate between his five children equally, and the other half, after the death of his wife, who had the life use, in the same way, manifesting in no manner a discrimination against either of the daughters, or anywhere in the will an indication or desire that any portion of his property should go into intestancy. This very sum of \$34,000 he expected to be paid before his residuary estate was reached, but to be restored in effect by deduction from Emma's share; and can it be said that he even remotely intended to discriminate so that Emma should lose by his will and the agreement the sum of \$34,000, then have one-fifth of it restored by force of residuary clause in the same will, while one-fifth was added to the other daughter's share, she having received an absolute advancement, and the other three children the rest of Emma's portion to swell their shares; that he in-

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musth as old upon the market, and therefore he must have tended a reversion of the sum advanced to the advancer, the advancement failing; that he meant to deprive a daughter marrying with his consent the privilege of sharing with the others his dying bounties, because she might give her portion to a husband, who may have been devoted to her and given her a happy life when he accorded the same right to another daughter? Or exclude Emma from a share equal with the others if she survived that husband? The surrounding circumstances must be examined to ascertain the intent (*Kerr v. Dougherty*, 79 N. Y., 328). The construction is favored which permits participation of descendants (*In re Brown*, 93 N. Y., 295). It would need some unmistakable evidence of an intent to discriminate against the daughter to justify the conclusion that the provision for the advancement to her through the antenuptial agreement was intended as a discrimination to diminish her share, and enhance that of the others in case she died childless. That contingency, at the time of the execution of the will, was not a probable one, and was evidently not so prominent a factor in the expression of testamentary intent as was the paramount declaration of equality for all of the children, only deducting from the shares which the daughters were to receive the sum which he had absolutely given to trustees for Gertrude, and the sum which he regarded as an obligation against his estate for the other daughter, Emma. In the antenuptial agreement he had given the power of appointment, and thus of discrimination between her children, to Emma, showing that he intended this principal fund to be at her disposition, only protecting her in the income for life, and providing that the principal should cease to be an obligation against his estate in case of her death childless. The contingency happened long after his will was made which relieved his estate from any obligation, and so prevented that from being an advancement which might otherwise have been adjudged to be one, irrespective of the will (*Code*

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Civ Proc., § 2733). He did not expect his residuary estate to be increased by relief from the antenuptial agreement. He regarded that sum as gone forever, and, hence, provided for its deduction from the share of the one who received it. The deduction fails because its foundation fails.

It is argued that the payment of the life income to Emma was a benefit to her, and that the other children did not receive similar benefits. This is not correct as to the daughter Gertrude, who, of course, received the benefit of the sum absolutely placed with the trustees for her; and there is no evidence but that this father provided just equalizing bounties between the other children during his life.

Let judgment be entered allowing the defendant, Ricci, the sum of \$34,000 and interest.

LOUIS M. SIMPSON ET AL., APPELLANTS, v.
JERSEY CITY CONTRACTING COMPANY,
RESPONDENT.

SUPREME COURT, APPELLATE DIVISION, FIRST DE-
PARTMENT, JANUARY TERM, 1900.

§ 649, subd. 3.

*Attachment of stock of foreign corporation — Construction sub-
division 3, section 649, Code Civil Procedure.*

Where stock in a foreign corporation, belonging to a non-resident, has been deposited with a resident of this State as security for a loan, the reversion or right to possession of the stock upon payment of the loan is attachable at the suit of a creditor of the pledgor, by leaving with the pledgee a certified copy of the warrant of attachment and a notice in the form prescribed by subdivision 3 of section 649 of the Code of Civil Procedure.

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Assuming that the validity of a levy so obtained is doubtful, a motion to vacate should not be granted, as the effect of the service of the warrant and notice can be better determined upon proceedings to enforce the levy than to set it aside.
(Decided January, 1900.)

Appeal from order vacating levy under an attachment.

Alfred B. Cruikshank, for appellant.

Woolsey Carmalt, for respondent.

INGRAHAM, J.—This action was commenced to recover \$2,000 for professional services rendered by the plaintiff to the defendant, a corporation organized under the laws of the State of New Jersey. An attachment was obtained, and, acting under it, the sheriff has attempted to levy upon 3,220 shares of the capital stock of the New Jersey and Pennsylvania Telephone Company, a foreign corporation organized under the laws of the State of New Jersey, the property of this defendant. It appears that this stock was pledged to the Produce Exchange Trust Company of the City of New York as security for a loan of money, and that the sheriff, under the warrant of attachment, attempted to levy upon the said stock by serving upon the Produce Exchange Trust Company a notice in the form prescribed by subdivision 3 of section 649 of the Code of Civil Procedure. It appears from the affidavit of the treasurer of the defendant that the said 3,220 shares of stock belong to the defendant and are now on deposit with the Produce Exchange Trust Company of the City of New York, pursuant to an agreement whereby the same is so deposited as a pledge or security for the payment of a certain note for \$2,350,

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and that such levy was made by serving upon the said Produce Exchange Trust Company, or some of its officers, a notice in the form prescribed by subdivision 3 of section 649 of the Code of Procedure. Subdivision 2 of that section of the Code provides that a levy under a warrant of attachment must be made upon the personal property capable of manual delivery by taking the same into the sheriff's actual custody. Subdivision 3 of the same section provides that a levy under a warrant of attachment must be made upon other personal property by leaving a certified copy of the warrant and a notice showing the property attached, with the person holding the same; or, if it consists of a right or share in the stock of an association or corporation, or interest or profits thereon, with the president or other head of the association or corporation, or the secretary, cashier or managing agent thereof. In opposition to this motion an affidavit was submitted on the part of the plaintiff to show that the sheriff made the levy by serving the certified copy of the warrant, with the proper notice, upon the secretary of the Produce Exchange Trust Company, and that a certificate of the Trust Company was given to the said sheriff by the said Trust Company, under section 650 of the Code of Procedure. No copy of the certificate, however, is annexed to the affidavit. It thus appeared that the stock of a foreign corporation was deposited with a resident of this State as security for a loan. That such stock is property and incapable of manual delivery is apparent; and it seems that the right of or title to such stock, vested in a person against whom a warrant of attachment has been issued, can be levied upon under an attachment. The question under consideration is how a valid levy upon such

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property can be made under section 649 of the Code. By the transfer of this stock to the Produce Exchange Trust Company as a security for a loan of money the Produce Exchange Company acquired a special interest in the stock and became entitled to hold the same as security for its loan. It was thus a person "holding the same" within subdivision 3 of the section before cited. The property has come within this State by the transfer of the shares of stock by the defendant corporation to the Exchange Trust Company as security for a loan of money. The Trust Company, being in possession of the stock as bailee, became the trustee for the pledgor, first, to pay the debt, and, second, to pay over the surplus to the defendant (*Wheeler v. Newbould*, 16 N. Y., 398; *Gillet v. Bank of America*, 160 N. Y., 552, 560). The defendant has the right of a re-delivery of the stock to it upon payment of the loan for which it was held as security; but the title to the stock or the right to the possession thereof having passed to the Trust Company, who holds it as trustee, the reversion or right to the possession of the stock upon payment of the loan is property, which is within this State, and I can see no reason why it should not be subject to a levy by attachment. The defendant has subjected this stock to the laws of this State by reason of bringing it here and depositing it with a resident of this State; and the Trust Company having the evidences of the ownership of the stock in its possession and by a transfer of such indicia of title or ownership to a sheriff after payment of the amount loaned for which the stock was held as security, a good title to the stock would be transferred to a purchaser from the sheriff under an execution to be issued in a judgment in this action, if one should

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be obtained. The last clause of subdivision 3 of section 649 of the Code applies only to domestic corporations. It was so expressly held in *Plympton v. Bigelow* (93 N. Y., 592). As was said by the Court in that case: "It would scarcely be expected that the Courts of another State would recognize a title to corporate stock in one of its own corporations, founded upon a sale upon an attachment issued by our Courts against a non-resident, when the only semblance of jurisdiction over the property was the service of notice in the statement proceedings upon an officer or agent of the corporation here. * * *

We are, therefore, of the opinion that the fundamental condition of attachment proceedings, that the res must be within the jurisdiction of the Court in order to be an effectual seizure is not answered in respect to shares in a foreign corporation by the presence here of its officers, or by the fact that the corporation has property and is transacting business here, and that section 647 must be construed as applying to domestic corporations only." It is quite evident that the Court here was speaking of the last clause of section 649 of the Code and not of a case where the owner of stock of a foreign corporation had deposited with a resident of this State who then actually held the stock or the indicia of title which would enable a transferee to acquire a valid title to the stock by virtue of a title or right to possession actually vested in a resident of this State over whom the Court has jurisdiction. In such a case the stock itself is here. The Court does not get jurisdiction over the property by service of a notice in the attachment proceedings upon an officer or agent of the foreign corporation, but obtains jurisdiction over the property, namely, the stock, by serving an attach-

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ment upon the person in whose possession the stock actually is and who is a resident of this State. The affidavit upon which this motion is made, as before stated, expressly states that these 3,220 shares of stock belong to the defendant and are now on deposit with the Produce Exchange Trust Company of the City of New York, and such stock being thus on deposit in the State of New York, the Court had jurisdiction over the stock itself and could acquire a title to the stock by seizing upon the res, namely, the stock, and transferring it to satisfy any judgment to be paid in this action. The cases cited from other States, in which it was held that the seizure of a stock certificate is not sufficient to give the Court jurisdiction over the res, the stock itself, do not apply. In this case the defendant has seen fit to deposit the stock with a resident of the State of New York, and the stock thus held in the State of New York is subject to the jurisdiction of the Court. But, assuming that the question as to whether or not the plaintiff has obtained a valid levy upon the stock is doubtful, I do not think that question should be determined upon this motion. To succeed upon this motion the defendant was bound to make it appear that the levy was voidable or void. The sheriff has not attempted to take possession of the stock from the Trust Company, but has simply served a notice required by the Code for the purpose of attaching the right of the defendant to the stock so far as that right is capable of levy under such attachment. That this is a proper proceeding where personal property is held by a pledgee as collateral security for a sum of money was settled by *Warner v. Fourth National Bank* (115 N. Y., 251). By the service of the copy of this warrant of attach-

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ment upon the Trust Company there was either a valid levy or the notice was ineffectual for any purpose. If the service of such a notice was ineffectual, there was no levy to set aside or vacate. If there was a valid levy, or the notice was effectual in any way to bind such stock, such levy should not be set aside upon notice. Where a sheriff takes possession of property belonging to a non-resident defendant under an attachment, and where the property was not subject to such levy, the only way that the property can be released is by a motion to set aside the levy; but where, as here, all that has been done would be to serve a notice upon a person claimed to be in possession of the property of the defendant, and where a question is presented as to whether or not the sheriff is entitled to levy upon that property, the effect of that notice can be much better determined upon proceedings to enforce the levy than to set it aside.

I think, therefore, that the order appealed from should be reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs.

O'BRIEN, J., concurs; RUMSEY, J., concurs on first ground.

VAN BRUNT, P. J.—I am of the opinion that no valid levy was or could be made upon the stock in question (Matter of Whiting, 150 N. Y., 37), and, therefore, no motion was necessary to be made to set aside a levy which never existed. I concur in the result for the above reason.

Sufficiency of levy.—In the case of personal property, other than "personal property capable of manual delivery," when the sheriff levies an attachment, he must have a certified copy of the

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warrant and a notice showing the property attached, with the person holding the same.

Prior lien.—The burden of establishing is in the one who asserts as against the sheriff. *Robinson v. Columbia Spinning Co.*, 28 Civ. Proc. Rep., 135; S. C., 31 App. Div., 238.

Property incapable of manual delivery.—An unmatured insurance policy is not—"an instrument for the payment of money." *Kratzenstein v. Lehman*, 19 App. Div., 228.

Nor is a fire insurance policy. *Trepagnild v. Rose*, 18 App. Div., 393.

Pleading.—Demurrer lies for insufficiency where it does not appear upon the face of the complaint that the property therein referred to was incapable of manual delivery and that the same could not have been taken possession of by the sheriff. *N. Y. Life Ins. and Trust Co. v. Richardson*, 2 Law Rec., 25, 27.

Jurisdiction.—The Court has no power, by the appointment of a receiver, to interfere with the manual possession of the transferred property, and before the sheriff can make a levy the incumbrance must be removed. *Home Bank v. Brewster & Co.*, 33 App. Div., 330.

JOSEPHINE KAGER, RESPONDENT, v. CHARLES
BRENNEMAN, ETC., APPELLANT.

SUPREME COURT, APPELLATE DIVISION, FIRST DE-
PARTMENT, JANUARY TERM, 1900.

§§ 2481, 2742, 2743.

Res adjudicata — Effect of surrogate's decree — Dower right.

A Surrogate's Court has jurisdiction to compel an executor to account for land in which he has invested estate money and for that purpose to treat the land as personal property.

A decree of a surrogate made on the settlement of an executor's account, directing a distribution of the estate, which adjudges that the executor has invested a specified amount of estate money in land, together with a specified amount of his own money, and charges him with a proportionate share of the investment as an asset of the estate, is *res adjudicata* as to all parties who were duly cited or who appeared on the accounting.

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The wife of an executor is not entitled to dower in a fractional interest in land purchased by her husband with estate money.

In an action by the beneficiaries entitled to two-ninths of an estate to compel an executor to account for an investment of estate money in land, partly purchased with estate money and partly with his own money, and for a proportionate part of the income thereof, held, that it was error to direct a sale of the property and a division of its proceeds, as such relief would virtually make the action one for partition. The executor should be compelled to convey to each beneficiary the fractional interest in the land representing his share of the investment.

(Decided January, 1900.)

Appeal from judgment entered after trial at Special Term.

A. C. Thomas, for appellant.

H. A. Forster, for respondent.

PATTERSON, J.—The question arising on this appeal relates to the competency of the only evidence by which the plaintiff sought to establish the cause of action set forth in the complaint. The suit was brought to compel the defendant, Charles Brenneman, to account to the plaintiff for her proportion of certain moneys of an estate which came into his hands as the executor of the last will and testament of Frederick Leonard, deceased; to follow the moneys into, and to enable her to realize her share by sale of, certain real property in which she alleged the executor had invested the money, and the title to which real property he took and now holds in his own name. He is made a party defendant, individually and as executor. His wife, Elizabeth Brenneman, is likewise a defendant, as are also certain persons interested under the will of the testator in the same manner as the plaintiff. The present appeal is by the defendants, Brenneman. Charles Brenneman, is

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his answer, denies that moneys of the estate, belonging to the plaintiff, were invested in the realty, but he admits that certain moneys of the estate in which others than the plaintiff are interested were used in that investment, but with their consent and approbation. The fundamental fact to be established by the plaintiff is the employment of the moneys of the estate in the manner asserted in the complaint. On the trial of the action in the Court below, the plaintiff, to sustain her cause of action, offered in evidence the record of a proceeding in the Surrogate's Court of New York county, including the decree made in that proceeding, settling the account of Brenneman as executor and establishing the interests of the plaintiff and other legatees in the assets of the estate and directing distribution among various parties entitled to share in the estate, including the plaintiff and the defendants, other than the Brennemens. In the proceeding in the Surrogate's Court it was found that the executor, Charles Brenneman, invested \$29,188.36 in real estate, of which \$12,388.71 was money of the estate of Frederick Leonard. He was charged by the surrogate on the accounting with the last-mentioned sum. It was also adjudged that the executor had received certain rents, issues and profits of the same real estate, for which he was accountable in that proceeding, and that this plaintiff was entitled to one undivided eighteenth equal part of such rents, issues and profits. The surrogate also decreed that the plaintiff was entitled to one-eighteenth equal part of the interest of the estate in the realty acquired partly by the use of the moneys of the estate in its purchase, and he held that the plaintiff was entitled to that share of the realty and to the possession thereof.

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It appears by the pleadings that the decree of the surrogate was affirmed by the General Term of the Supreme Court, but on appeal to the Court of Appeals it was modified, that Court striking out of the decree those provisions which constituted an adjudication of title to the realty and an award of the possession thereof, but it left intact all the other provisions of the decree, which defined what the assets of the estate were and the shape and form in which they existed. The Court below, on the trial of this action, admitted in evidence the surrogate's decree under the objection and exception of the appellants, whereupon the plaintiff rested her case. The defendant, Brenneman, offered no evidence and the Justice at Special Term directed the entry of the judgment now appealed from, in which the relief asked in the complaint is substantially granted.

It was insisted by the defendants at the trial, as it is now, that the plaintiff was bound to establish independently and de novo all the facts which constituted her cause of action; that the surrogate's decree was incompetent for that purpose because the effect of such a decree is expressly provided for by section 2742 of the Code of Civil Procedure, which declares that the judicial settlement of the account of an executor or administrator is conclusive evidence against the parties who were cited or appeared on the accounting of certain facts referred to in that section and of no others. If the effect of the surrogate's decree in the accounting of Brenneman, executor, is limited by the four subdivisions of section 2742, that decree was plainly incompetent as evidence to establish the fact of the use of the moneys of the estate of Leonard in the purchase of the real estate involved in this action, or the inter-

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est of the plaintiff in that which was produced by the use of such moneys; but, on the final settlement of such an account, the surrogate has something more to do than pass upon debits and credits of the administration. Where there is a judicial settlement of the account, and any part of the estate is ready for distribution, the decree must direct payment and distribution to the persons entitled, according to their respective rights, and where the validity of a distributive share has been established upon an accounting, the decree must determine to whom it is payable, the sum to be paid by reason thereof, and all other questions concerning the same, and with respect to these matters the decree is conclusive as a judgment upon each party to the proceeding, who was duly cited or appeared (§ 2743, Code of Civil Procedure). The decree of the surrogate in this case was made for distribution, on the final settlement of the executor's account at his own invocation, and it was the duty of the surrogate to ascertain what the assets of the estate were. In order to do that, he had jurisdiction to compel the executor to account for the land in which he had invested the money of the estate, and for that purpose to treat the land as personal property. That was held at the General Term upon the accounting of this executor (Matter of Leonard, 86 Hun, 298) upon the authority of *Lockman v. Reilly* (95 N. Y., 64), and the decision of the Court of Appeals in modifying the decree does not suggest or intimate a contrary view. Having the power to compel the executor to account for the land as an asset and as personal property, the surrogate had necessarily the jurisdiction to inquire into and determine all the facts relating to that investment, in order that he might ascertain whether there was

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accountability for it or not. The powers of the surrogate are undoubtedly only those prescribed by statute, and he has no jurisdiction to declare title or to pass upon the ownership of realty or to enforce trusts. But by section 2481 (subd. 11) of the Code of Civil Procedure, he has authority given him to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred. Hence, where it is necessary to a decree of distribution he may construe a will (*In re Verplanck*, 91 N. Y., 439; *Garlock v. Vondevert*, 128 N. Y., 374), and so in this case, in order to award or make distribution of the interests of the parties entitled as legatees under the Leonard will he had the incidental power and jurisdiction to determine those matters of fact which would make the executor chargeable with the real property and the rents, issues and profits thereof as an asset of the testator's estate. Therefore, he had the jurisdiction to pass upon that which is the essential and pivotal fact upon which the plaintiff's present case rests, and that matter was litigated before him. It was necessary for him to pass upon it in order that he might determine that the rents, issues and profits were assets, and to distribute them by the decree. While his jurisdiction was circumscribed, his determination, nevertheless, constitutes an adjudication of fact by a competent tribunal with respect to the executor's status as to this property, and as the whole matter has been litigated once between the same parties in a Court of competent jurisdiction, it is *res adjudicata* as to all such parties, they having been properly cited and represented in the surrogate's proceeding.

It was further objected by the defendant, Elizabeth Brenneman, that the record in the Surrogate's

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Court was not competent evidence against her because of her interest as doweress and that she did not appear before the surrogate in that relation. She was not cited as the wife of Charles Brenneman, but only as a legatee under the will of her grandfather, and the rule is invoked that she cannot be affected by a decree of the surrogate which would act upon her interest as such doweress. It is a familiar rule that a judgment for or against an executor, administrator, assignee or trustee, does not generally preclude him, in a different action affecting his own person and as an individual, from disputing a finding against him in a representative capacity, if he is not made a party also in his individual capacity and that a judgment against a party sued only as an individual is not an estoppel against him when he sues or is sued in another capacity or character. But that question does not arise in this case. Mrs. Brenneman was a party duly cited before the surrogate, and she appeared and was represented there. In that proceeding it was adjudged that the interest of the estate in the realty was personal property to be accounted for by the executor. If it is such and Charles Brenneman does not hold it in his own right, his wife is not entitled to dower in that fractional interest of the real property which was derived from the investment of the estate money. The finding of the surrogate is that the executor used moneys of the estate in the purchase of this realty. Irrespective of any declaration by the surrogate that the executor thereby became a trustee of a fractional part of the realty for those entitled under the will, that conclusion of law necessarily results from the fact found, and hence the wife would not be entitled to dower in that fractional part.

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We think the decree of the surrogate was competent evidence to establish the main fact upon which the plaintiff was entitled to recover, but that the judgment was incorrect in so far as it directed a sale of the premises in order that the interest might be realized out of the proceeds of such sale. The relief granted virtually made this an action for partition. We think that under the proofs the proper judgment would be a direction that Brenneman convey to the plaintiff and the defendants, Edward Leonhard, Mary E. Side and Frederick Leonhard, each the one undivided part or share in the real estate, instead of in the proceeds of sale, and that Charles Brenneman account to them for their respective shares of the rents, issues and profits, subject to whatever deductions may be required under the proofs and findings and as the same may be made to appear on the settlement of the judgment to be entered on this decision. The judgment will be modified in accordance with the views herein expressed, and, as thus modified, affirmed, without costs to either party.

O'BRIEN and INGRAHAM, JJ., concur. VAN BRUNT, P. J., and McLAUGHLIN, J., dissent.

Jurisdiction of the surrogate.—As to the power or jurisdiction of the surrogate under section 2481, see the following decisions:

Generally: *Matter of Henderson*, 157 N. Y., 423; *Matter of Pye*, No. 1, 18 App. Div., 308; *Matter of Klipp*, 17 Misc., 494; *Conant v. Wright*, 19 Misc., 325; *Matter of Randell*, 26 Civ. Proc. Rep., 255; *Matter of Havermeyer*, 75 St. Rep., 338; *Matter of Klipp*, 75 St. Rep., 671; *Westchester County v. Dressner*, 23 App. Div., 217; *Matter of Carey*, 24 App. Div., 534; S. C., 49 N. Y. Supp., 32; S. C., 83 Lt. R., 32; *Matter of Henderson*, 33 App. Div., 547; S. O., 28 Civ. Proc. Rep., 389.

Under subdivision 2. Adjournments, supplemental citations and additional notice of proceedings. *Matter of Laytin*, 74 St. Rep., 292.

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Under subdivision 4. Enjoining executor, administrator, testamentary trustee or guardian from acting. *Borrowe v. Corbin*, 27 Civ. Proc. Rep., 375; S. O., 31 App. Div., 178

Under subdivision 8. Disqualification of Judge. *Matter of Carey*, 24 App. Div., 532.

Under subdivision 9. To complete all matters begun. *Matter of Carey*, 24 App. Div., 533.

Under subdivision 11. With respect to any matter not expressly provided for in this section to proceed according to the course and practice of a Court having, by the common law, jurisdiction of such matters, except as otherwise prescribed by statute. *Matter of Friedell*, 20 App. Div., 383; S. C., 46 N. Y. Supp., 787; S. C., 80 St. Rep., 787; *Borrowe v. Corbin*, 27 Civ. Proc. Rep., 366; S. C., 27 Civ. Proc. Rep., 373; S. O., 31 App. Div., 178; *Martin v. Hann*, 32 App. Div., 604.

Judicial settlement — Upon whom conclusive.—Section 2742.

A judicial settlement is conclusive against all the parties properly cited or who have appeared, and upon all persons deriving title from any of them as to any allowances made to the accounting party for money paid to creditors, legatees or next of kin.

It is also conclusive upon the sureties on the administrator's bond. Likewise to the sureties upon a bond given by a guardian. *Altman v. Hofeller*, 152 N. Y., 498-502. See also the following cases cited: *Scofield v. Churchill*, 72 N. Y., 565; *Gerould v. Willson*, 81 N. Y., 573-583; *Deobold v. Oppermann*, 111 N. Y., 531-536; *Douglas v. Ferris*, 138 N. Y., 192-201.

Where a settlement has been had and a decree made in derogation of a person's rights, the decree may be attacked and opened and the personal representatives must justify the distribution. *Matter of Gall*, 29 Civ. Proc. Rep., 178-181; S. O., 40 App. Div., 114. See also *Matter of Whitbeck*, 22 Misc., 494-502; *Frethey v. Durant*, 48 N. Y. Supp., 839, 840.

Items, correctness of. A decree under section 2742 is conclusive only as to the correctness of the items allowed to the accounting party. In re *Whitbeck*, 50 N. Y. Supp., 932-937.

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**ANSON PHELPS STOKES, RESPONDENT, v. THE
MANHATTAN RAILROAD, APPELLANT.****SUPREME COURT, APPELLATE DIVISION, FIRST DE-
PARTMENT.****§ 452.***Elevated railway law — Parties' supplemental pleading.*

On a motion for leave to serve a supplemental pleading, the proposed pleading must accompany the motion papers or the motion will be denied.

Where an action has been brought by an abutting owner against an elevated railway company for an injunction and damages, and the plaintiff conveys the property pendente lite, the grantee does not become a necessary party to the action and will not be brought in against his will.

The propriety of bringing in the grantee as a party, even if he consents, rests in the discretion of the Court, and discretion in the affirmative should be exercised only in a case where it is quite clear that the rights of the original parties cannot be finally disposed of without the presence of the grantee. *Koehler v. Man. Ry.*, 159 N. Y., 218, distinguished.

(Decided January, 1900.)

Appeal from order bringing in a new defendant.

Charles A. Gardner (attorney) and *Arthur O. Townsend* (of counsel), for appellant.

Edward W. Sheldon (attorney and counsel), for respondent.

RUMSEY, J.—On the 11th of December, 1890, the plaintiff was the owner of the premises in front of which the defendant's road had been erected and was then operated, and he brought this action to obtain

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the usual injunction and damages for the injury to his easement. Issue was joined on the 17th of August, 1892. On the 13th of January, 1893, the plaintiff conveyed the premises to one Rosenfeld, but in the deed has reserved to himself all causes of action for damages to the rental value of the premises arising from or in any way connected with the construction or maintenance of the defendant's railroad. In October, 1899, a motion was made to bring in Rosenfeld as a party defendant and for leave to serve a supplemental complaint, it being made to appear that he refused to be a party plaintiff. This motion was granted, and from that order this appeal is taken.

The papers upon which the motion was made were clearly deficient because no copy of the proposed supplemental pleading was served, and for that reason the order should be reversed if for no other. But we think that upon the merits also the order was erroneous. When this action was brought the plaintiff was the owner of the property and had an interest in procuring not only the equitable relief sought, but the damages for the trespass already committed. When, however, he had sold the property he had no further interest in restraining the continuance of the trespass, and the only right that was left to him was to recover for the damages sustained by the trespass previously committed. *Hutton v. Met. El. R. R.*, 19 App. Div., 243, and cases cited; *Lindenheim v. Man. Ry.*, 28 App. Div., 170; *Mooney v. N. Y. El. R. R.*, 13 App. Div., 380.

The right to restrain a future continuance of the trespass belongs after the conveyance only to the grantee (*Pappenheim v. Met. El. Ry.*, 128 N. Y., 436), and that right in the grantee is not only as perfect

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as it was in the original vendor, but it is exclusive in him, and the grantor has nothing to do with it. It is, too, a new cause of action for an injury to the right of the grantee which arose only after he had received the conveyance and did not exist when this suit was begun. The rights of the two parties are entirely distinct. One has a cause of action for damages in a pending suit, and the other is entitled to maintain an action for an injunction on the equity side of the Court. This action he may bring if he chooses, but the question presented is whether he may be compelled against his will to be joined as a party for the purpose of enforcing that cause of action. It has already been held that where one has conveyed the property, reserving his right to damages to the premises, he cannot, by petition, be joined as a party plaintiff in the action brought by his grantee for an injunction. *Shepard v. Manhattan R. R.*, 82 Hun, 527; *aff'd* 147 N. Y., 687.

It has also been held in this Court in just such a case as this that an order giving the plaintiff leave to join as a party defendant his subsequent grantee, could not be sustained, and that order was reversed. *Mooney v. El. R. R.*, 13 App. Div., 380.

The principle which obtains in this case is entirely clear. The owner of the premises, as long as he retains the title, has an interest in restraining the trespass which effects the value of his property. He has also a right to bring an action for damages he has sustained by reason of these trespasses. The right of action for an injunction is an incident of the ownership of the property. The right of action for damages is personal to the owner, and still remains with him after he has disposed of the property, and when he has ceased to be the owner it

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is all there is left of his cause of action, for as he has no further interest in the premises he has no right to ask for an injunction, but for the damages he has already suffered he may still maintain his suit, and if he has already begun a suit for an injunction and damages, while he is no longer entitled to the injunction because he has ceased to be the owner, he may still maintain the action for the damages. *Pegram v. N. Y. El. R. R.*, 147 N. Y., 135.

As he can recover in that action nothing but the damages, all of which belongs to him when collected, it is not perceived how the presence of any other party is necessary for a final determination of the rights which can be adjudged in that action. The grantee who has taken title to the premises alone has any interest in obtaining an injunction. That right belongs to him exclusively. Nobody else has any interest in it. No one else can control it. *Pappenheim v. Met. El. R. R.*, 128 N. Y., 436.

He may bring a suit to enforce it; he may negotiate with the trespasser to stop the trespass or to pay him for the privilege of continuing it; he may sue for damages for it from time to time without any effort to restrain its further commission, or he may, if he sees fit, stand by and permit the commission of the trespass without an effort to restrain it or recover damages for it. Whatever he may do, it does not affect the right of the former owner to sue for his damages, and that right can be determined without his presence and consequently he is not either a necessary or proper party within section 452 of the Code of Civil Procedure. If he sees fit to enforce his rights he is entitled to do so in an action brought by him, which he can control, asking for any of the various kinds of relief to which he is entitled, and

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being in a position to continue the action or to settle it at his own will.

I apprehend that there is neither precedent nor principle for compelling him, if he does not choose to bring his action, to come into the case as defendant and thus be bound by a judgment for which he does not ask and where his rights are determined in a suit he has not brought and cannot control. It would seem that these considerations were controlling, but the plaintiff relies upon a dictum contained in the recent opinion of the Court of Appeals in the case of *Koehler v. N. Y. El. R. R.* (159 N. Y., 218-225). In that case it is said by the learned Judge delivering the opinion of the Court that where the plaintiff in an ordinary equity suit against an elevated railroad company conveys the property affected by the litigation, he may make a timely motion upon due notice to the defendant for an order bringing in his grantee as an additional plaintiff or as a defendant if he refuses to be a plaintiff, and upon the record as so amended the case may proceed to trial upon all the issues on the equity side of the Court. The facts in that case were that Koehler, being the owner of the premises, had brought the usual action for an injunction and damages. Pending the action he conveyed the property, and then made a motion for leave to bring in the grantee as a plaintiff and for leave to serve a supplemental complaint. The grantee was apparently willing to be brought in and to have his rights settled in that action, and, against the protest of the defendant, the order bringing him in was made. No appeal was directly taken from that order, but the notice of appeal from the final judgment contained a clause to the effect that upon the argument of that appeal the order would be

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reviewed. Upon the argument of this case in this Court no question was made as to the propriety of the order, but in the Court of Appeals the question seems to have been raised by the suggestion that the defendant was entitled to a jury trial. This was met and answered by an allusion to the fact that the defendant was guilty of laches by going to trial without demanding a jury until after evidence had been taken in the case. The Court then went on to determine the case upon the merits and the conclusion reached is that quoted above. So far as that conclusion determines the proposition required by the facts in the case it is undoubtedly binding on us as to the question it raised of the power of the court to bring in as a party plaintiff a grantee of the premises by a conveyance executed after the action for the injunction has been brought. But it does not determine, and it cannot determine, because the question was not presented, that such a grantee, who had no desire to be plaintiff, could be compelled as a defendant to submit to the litigation and determination of his rights which had arisen after the commencement of the grantor's action, in a suit over which he had no control. In the Koehler case the subsequent grantee was willing to be made a plaintiff and to have his rights determined in that suit. In this case he is not, and the order does not make him a plaintiff, but brings him in as a defendant, so that he is sued and made subject to the liability for costs because he happens to have a cause of action independent from that belonging to the plaintiff, and which he does not desire to litigate. For that reason the case of Koehler does not apply. But, in addition, that case can only apply as to the power of this Court to bring in a party, and even though it may be regarded as

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determining that this Court has the power to bring in a party as a defendant, under the circumstances revealed here it cannot be deemed an adjudication as to the propriety of the exercise of that power, which is discretionary with this Court. Even if a person might thus be brought in as defendant, the discretion so to do should only be exercised in a case where it is quite clear that the rights of the original parties cannot be finally disposed of without the presence of the grantee. That clearly is not this case, because the only right of the plaintiff is to have a judgment for damages, and these damages can be determined without the presence of Rosenfeld. Therefore, in the exercise of its discretion the Court should have denied this motion.

The order bringing in Rosenfeld as a defendant is, therefore, reversed, with \$10 costs and disbursements, and the motion denied, with \$10 costs.

All concur.

Persons interested generally.—General assignee of the makers of a promissory note permitted to interview. *Merchants' Nat. Bk. v. Hagemeyer*, 25 Civ. Proc. Rep., 332.

Necessary parties.—Note on. See *Lewisohn Brothers v. Anaconda Copper Mining Co.*, 27 Civ. Proc. Rep., 262.

Costs — Liability for.—Where a person who is entitled to be made a party, fails to apply, and defends in the name of another. *Sands v. Church*, 27 Civ. Proc. Rep., 405.

Keim v. Brown.

**MARY A. KEIM, RESPONDENT, v. JOHN B. FRANK
ET AL., RESPONDENTS; PRATT A. BROWN,
APPELLANT.**

**SUPREME COURT, APPELLATE DIVISION, FIRST DE-
PARTMENT, JULY, 1899.**

§§ 3297, 3307, subds. 7, 11.

Referee's fees — Sales in partition.

The special act is in effect not to deprive Referees appointed to sell real property in the county of New York of their fees.

Section 3307 may still be resorted to for the purpose of ascertaining the proper allowance to a Referee under section 3297. Section 3307 no longer governs as between litigants and the sheriff, but the Referee's compensation may be computed thereon just as though the percentage specified therein had been literally embodied in section 3297.

It is those percentages which section 3297 gave to the Referees, and those percentages stand until they are taken away either by some act directly relating to Referee's fees or by some act relating to sheriff's fees, which can reasonably be brought within the original legislative purpose as that purpose was expressed when the Legislature saw that the fees of a Referee should be the same as those allowed to the county.

The Legislature has never said that the fees of a Referee should be the same as those allowed to the county.

(Decided July, 1899.)

Appeal by a Referee from an order of the Special Term, fixing his fees upon a sale in partition.

Pratt A. Brown, for appellant.

H. T. Slosson, for respondent.

BARRETT, J.—The Referee's complaint is that the learned Justice at Special Term adopted an erroneous method of computation with regard to his fees.

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Both sides agree that the fees are regulated by section 3297 of the Code of Civil Procedure. The material language of that section is this: "The fees of a Referee appointed to sell real property, pursuant to a judgment in an action, are the same as those allowed to the sheriff." What was immediately contemplated by this is clear enough. The fees to which a sheriff was then entitled upon the sale of real property were distinctly specified in a later section of the same Code (§ 3307, subds. 7 and 11). Under this latter section, sheriffs' fees varied somewhat in different localities. They were, however, the same in all the counties of the State except New York, Kings and Westchester. In these three latter counties a different rate was provided. It seems quite clear, so far, that the Referee's fees correspondingly varied, and that section 3297 allowed to a Referee appointed in any particular county the same fees as were then allowed to the sheriff of that county. The present question arises because of a special act passed in 1890 "in relation to the office of the sheriff of the city and county of New York" (chap. 523). Under that act the sheriff of the county of New York was made a salaried officer, and a radical change was made in the administration of the office. The fees collectible by the sheriff of the county of New York were revised and increased—in many respects doubled. The sheriff was required to account for these fees and pay them over into the treasury of the county; and the act provided that he "shall be entitled to one-half of such fees," to be paid to him upon the approval by the comptroller of his monthly accounts.

Under this special act the sheriff was authorized to collect as fees upon the sale of real property under

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an execution a larger percentage than he was theretofore allowed under section 3307 of the Code. The Referee in the present case claims that he is entitled to this increased percentage. The Court below held otherwise, and limited him to the sheriff's percentage, specified in section 3307. We think it clear that, if the increased percentage had been given to the sheriff by a simple amendment of this latter section, the Referee's fees would have kept pace therewith. The intention of the Legislature would not in that case have been questionable. The difficulty is, however, that the special act involves a complete change of system. Under the general act the sheriff was "entitled" to the fees for his services. Under the special act he is allowed a salary, and the city and county of New York is entitled to the fees for his services as its official. He is directed by the act (§ 17) to collect these fees and pay them over to the comptroller. As between the county and himself, he is "entitled" to a return of one-half of them. Such an act was not in any sense an amendment of the general act. What it did was to withdraw the particular locality from the area of the general act. No fees are "allowed to the sheriff" by this special act within the intent and meaning of that phrase, as used in section 3297. It is impossible to adapt the latter section to the special act, as it would have been impossible harmoniously to ingraft the special act upon section 3307. Practically, what is now allowed to the sheriff in this county is a salary, and a claim upon the county for one-half of the fees allowed to it. The legislative intent, as expressed in section 3297, could not have comprehended such changed conditions as these. It related to the gen-

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eral system of sheriff's fees then in vogue, as minutely provided for in section 3307. And it undoubtedly embraced later variations in the quantum of those fees made by amendment to section 3307, or by an equivalent special act. But it certainly did not contemplate the adaptation of the Referee's fees, allowed by section 3297, to a salaried system, in which the fees become primarily the property of the county and are returned to the sheriff, in part, as an incident to his salary.

We have said that the special act in question took the sheriff of the county of New York out of the area of the general act. The effect of this, however, was not to deprive Referees appointed to sell real property in this county of any fees. Section 3307 may still be resorted to for the purpose of ascertaining the proper allowance to a Referee under section 3297. The former section no longer governs as between litigants and the sheriff, but the Referee's compensation may be computed thereon quite as though the percentage specified therein had been literally embodied in section 3297. It is those percentages which section 3297 gave to the Referees; and those percentages stand until they are taken away either by some act directly relating to Referee's fees, or by some act relating to sheriff's fees which can reasonably be brought within the original legislative purpose, as that purpose was expressed when the Legislature said that the fees of a Referee should be the same as those allowed to the sheriff. The Legislature has never said that the fees of a Referee should be the same as those allowed to the county.

The order appealed from should be affirmed, with \$10 costs and disbursements of the appeal.

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VAN BRUNT, P. J.; INGRAHAM and McLAUGHLIN, J. J., concur.

RUMSEY, J., concurs, except that he is of opinion that the Referee's fees provided for in section 3297, could only be varied by a direct amendment to section 3307, with regard to sheriff's fees, and would not be affected by "an equivalent special act."

THE MAYOR, ALDERMEN AND COMMONALTY
OF THE CITY OF NEW YORK, RESPONDENT, v.
JOHN J. BANNAN ET AL., APPELLANTS.

SUPREME COURT, APPELLATE DIVISION, FIRST DE-
PARTMENT, JULY, 1899.

§ 449.

Construction of section 56, consolidation act — Action by the city on undertaking on appeal to Court of Appeals.

By virtue of section 56 of the consolidation act, which provides that "No officer or persons who is paid a salary for his services from the city treasury, and who entered upon his office since May 28, 1880, or shall hereafter enter upon his office, shall receive to or for his own use any fees, costs, * * * or money paid to him in his official capacity; but all fees, costs * * * and money so paid or received by any officer or person shall be the property of the city and shall be paid by him into the city treasury," an action is maintainable by the mayor, aldermen and commonalty of the city of New York on an undertaking on appeal to the Court of Appeals given by a relator in a certiorari proceeding brought to review the determination of the board of city record, consisting of the mayor, counsel to the corporation and the commissioner of public works, in removing him from his position, as the city is the real party in interest within the meaning of section 449 of the Code of Civil Procedure.

(Decided July, 1899.)

Mayor, Aldermen and Commonalty of New York City v. Bannan.

Appeal from judgment overruling demurrer to a complaint.

Roger Foster, of counsel, for appellants.

John Whalen, Corporation Counsel (*Terence Farley*, of counsel), for respondents.

INGRAHAM, J.—The complaint was demurred to upon two grounds. First, that there is a defect of parties plaintiff; and, second, that the complaint does not state facts sufficient to constitute a cause of action. The action was brought upon an undertaking given upon an appeal to the Court of Appeals from an order of the General Term of the Supreme Court dismissing a writ of certiorari. The complaint alleges that one Higgins made an application for a writ of certiorari to review the proceedings of the mayor, corporation counsel and the commissioner of public works of the city of New York removing him from the position of clerk of the City Record; that such writ was dismissed by the General Term of the Supreme Court, and that Higgins appealed to the Court of Appeals; that, on such appeal the defendants executed an undertaking by which they jointly and severally undertook that Higgins would pay all costs and damages which might be awarded against him if said order should be affirmed or the appeal dismissed, together with all costs and damage which might be awarded against the appellant, not exceeding \$500; that subsequently the said order of the General Term, so appealed from, was affirmed by the Court of Appeals, with costs, and that the costs of the said proceedings in the Court of Appeals were duly taxed and adjusted at \$104.07; that by section

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66 of the Consolidation Act (chap. 410 of the Laws of 1882), it was provided that "at all the times hereinafter mentioned Hugh J. Grant was mayor of the city of New York, William H. Clark was counsel to the corporation of said city, and Thomas F. Gilroy was the commissioner of public works of said city, and that all of said persons were paid a salary for their services from the city treasury," and by section 56, that "no officer or person who is paid a salary for his services from the city treasury, and who entered upon his office since May 28, 1880, or shall hereafter enter upon his office, shall receive to or for his own use any fees, costs * * * or money paid to him in his official capacity; but all fees, costs * * * and money so paid or received by any officer or person shall be the property of the city and shall be paid by him into the city treasury," and that by virtue of this statute the title to the costs awarded to Hugh J. Grant, mayor of the city of New York; William H. Clark, counsel to the corporation, and Thomas F. Gilroy, commissioner of public works, in the certiorari proceeding before referred to became vested in and became the property of these plaintiffs. The undertaking of the defendants was that they jointly and severally undertook that the appellant would pay the costs and damages which might be awarded against him if said order should be affirmed. These costs were awarded against the appellant in the certiorari proceeding, and the defendants became bound to pay them. By virtue of the statute, the costs awarded in favor of those public officers, whose proceedings were sought to be reviewed by the writ of certiorari, became the property of the city, and thus, by virtue of the statute, the city became entitled to such costs, and was the proper plaintiff

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in an action to enforce any obligation to pay such costs. As section 449 of the Code of Civil Procedure provides that the action must be brought in the name of the real party in interest, and as the plaintiff was the owner of the costs, and entitled to receive them, the plaintiff was the real party in interest, and entitled to bring an action to enforce an obligation to pay them. *Southerland v. Carr*, 85 N. Y., 105; *Board of Education v. Quick*, 99 N. Y., 138.

The respondents in the certiorari proceedings were not necessary parties to this action, as the costs became, by the act before referred to, the property of the plaintiffs, and such respondents had no personal interest therein.

The judgment appealed from is therefore affirmed, with costs.

All concur.

Who is party in interest? — Distinction made in counterclaiming claim acquired after decedent's death from claim coming to him in his representative capacity. *Weeks v. O'Brien*, 27 Civ. Proc. Rep., 110.

Demurrer. — When well taken. See *supra*.

Beneficiaries. — Need not be joined. *Seiford v. Mulligan*, 3 Law Rec., 110.

Stephens v. Meridan Britannia Company.

**GEORGE W. STEPHENS, AS RECEIVER OF THE
McCALL PUBLISHING COMPANY, RESPOND-
ENT, v. MERIDAN BRITANNIA COMPANY,
APPELLANT, IMPEADED WITH ARTHUR H.
PAGE ET AL.**

NEW YORK COURT OF APPEALS, OCTOBER, 1899.

§§ 2466, 2468, 2469.

Conversion — Receiver in supplementary proceedings.

An action for conversion will not lie by a receiver in supplementary proceedings, against a party who has taken property of the judgment debtor before the appointment of the receiver, under a chattel mortgage, which is void because not immediately filed as required by law, nor accompanied by an immediate delivery followed by an actual and continued change of possession of the property mortgaged.

In such a case the remedy of the receiver is by a bill in equity to remove any obstacle which would prevent him from taking possession of the property and thereupon sell it and apply the proceeds upon the debt which he represents. If the property has been consumed or for any reason cannot be identified or followed, he can in the same action compel those legally responsible to account for it and pay over the value thereof to the extent necessary to satisfy the debt or debts represented by him as well as the costs and expenses.

Chapter 314, Laws 1858, as amended by chapter 740, Laws 1894, to "declare and extend the powers of executors, assignees, receivers and other trustees," does not apply to receivers appointed in supplementary proceedings.

(Decided October, 1899.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, affirming a judgment entered on a verdict directed in favor of the plaintiff.

George S. Daniels, for appellant

George W. Stephens, for respondent.

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VANN, J.—On the 19th of November, 1892, a foreign corporation, known as the McCall Publishing Company, gave to the Meriden Britannia Company, another foreign corporation, a bill of sale of certain printing machinery and materials to it belonging, for the purpose of securing the payment of \$900, then owing by the former to the latter for rent past due and unpaid. This instrument, which in legal effect was a chattel mortgage, was not filed until December 7, 1892, owing to the request of the mortgagor and the promise of the managing agent of the mortgagee that he would withhold it from record "if it did not conflict with the security." The property remained in the possession of the mortgagor until the 8th of January, 1893, when the mortgagee took possession of it by virtue of the mortgage, and twelve days later sold it to the firm of Page & Ringot for the sum of \$900, its fair value.

When the mortgage was given, the McCall Publishing Company was owing one Walter Logan about \$1,700, and on the 8th of February, 1893, he recovered judgment for the amount of his claim. Upon the basis of this judgment, the plaintiff was appointed receiver of the property of the judgment debtor in proceedings supplementary to execution, instituted about the 20th of February, 1893, and on the 6th of May following, he commenced this action against the Meriden Britannia Company and the persons composing the firm of Page & Ringot, to recover damages for the conversion of said property by them on the 9th of January preceding.

Upon the trial of the action, the foregoing facts among others appeared, and, at the close of the evidence for the plaintiff, as well as at the close of the entire evidence, the defendant's counsel moved

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to dismiss the complaint upon the ground "that an action for conversion will not lie under the proof adduced, and that the plaintiff has mistaken his remedy." This motion was denied, and the Court directed a verdict in favor of the plaintiff for the sum of \$900, with interest for three years, amounting in all to \$1,062, the defendants duly excepting. Upon appeal to the Appellate Division, that Court reversed the judgment and granted a new trial as to the defendants, Page & Ringot, but affirmed it as to the Meriden Britannia Company, which now comes here.

As the mortgage was neither filed as required by law, nor accompanied by an immediate delivery, followed by an actual and continued change of possession of the property mortgaged, it was void as against judgment creditors of the mortgagor (L. 1883, ch. 279; *Stephens v. Perrine*, 143 N. Y., 476; *Sullivan v. Miller*, 106 N. Y., 635; *Jones v. Graham*, 77 N. Y., 628). It was not, however, absolutely void, for it was good as between the parties thereto and as against creditors at large. It was only void as to judgment creditors or creditors armed with some legal process authorizing the seizure of property (*Button v. Rathbone*, 126 N. Y., 187). It was not void as *malum in se*, but as *malum prohibitum*. It was valid as to all the world until attacked by a creditor standing upon an attachment or judgment. When the Meriden Britannia Company took possession of the property and sold it to Page & Ringot, the McCall Company could not have maintained trover or conversion, because it had transferred the property by an instrument which authorized the sale, and was conclusive so far as that company was concerned. Mr. Logan, the creditor

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now represented by the plaintiff, could not at that time have questioned the transfer in any way, because he was not then a judgment creditor and no attachment had been issued in his favor. Neither the giving of the chattel mortgage nor the taking of possession by virtue thereof and the transfer to third parties, conferred, at the date of such transfer, any right of action upon the McCall Publishing Company or upon Mr. Logan. Upon the recovery of judgment and the return of execution unsatisfied, Mr. Logan was still without power to maintain an action at law, but he could then have upheld a suit in equity to set aside the transfer so far as it was an obstruction to the collection of his debt.

When the receiver was appointed, the property of the judgment debtor became vested in him. He was then in a position to bring any action relating to that property which the judgment debtor or the judgment creditor could have brought, and none other. The judgment debtor, for instance, could have brought an action at law against anyone who had taken its property without its consent; while the judgment creditor could have brought an action in equity for taking the property of the judgment debtor even with its consent, provided such taking was fraudulent as to creditors. The receiver, having the title of the judgment debtor, can maintain any action supported by that title which the judgment debtor could have brought. Representing the judgment creditor, he can also maintain any action in equity to set aside a fraudulent transfer which the judgment creditor could have brought. As he represents no one except the judgment debtor and the judgment creditor, he can bring no action except

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such as the one or the other could have brought (*Bostwick v. Menck*, 40 N. Y., 383; *Metcalf v. Del Valle*, 64 Hun, 245; 137 N. Y., 545). As was said by the Court in *Bostwick v. Menck* (supra), "the appointment of the plaintiff as receiver of Beiser, made in the supplemental proceedings under the Code, vested in him the legal title to all the personal property of Beiser (*Porter v. Williams*, 9 N. Y., 142; *Barker v. Torrance*, 31 N. Y., 631). Such appointment conferred upon him the further right to prosecute such action, to set aside all transfers of property made by Beiser to defraud his creditors, as the creditors themselves could have maintained. * * *

He acquires no right to the property by succession to the rights of the debtor, for the reason that the transfer is valid as against the debtor and cannot be set aside by him as the debtor's successor; no rights other than those of the debtor are acquired. He does not acquire the legal title to such property by his appointment. That is confined to property then owned by the debtor, and the fraudulent transferee of property acquires a good title thereto as against the debtor and all other persons except the creditors of the transferrer; the only right of the receiver is, therefore, as trustee of the creditors. The latter have the right to set aside the transfer and to recover the property from the fraudulent holder, and the receiver is, by law, invested with all the rights of all the creditors represented by him in this respect. It is clear that the right of the receiver representing the creditors, and acting in their behalf, is no greater than that of the creditors. What, then, are the legal and equitable rights of a creditor as to property fraudulently transferred? Manifestly, only to treat as void and set aside such transfer so

far as shall be necessary to satisfy his debt and costs. He has no right to interfere with the transfer beyond this. When his debt and costs are paid, the transfer is as valid as to him as to other persons."

The receiver cannot bring an action at law for the taking of property formally transferred before the recovery of the judgment, because neither the judgment debtor nor the judgment creditor could have brought it. He can, however, by a bill in equity, remove any obstacle, such as a fraudulent transfer, which, until set aside, would prevent him from taking possession of the property and thereupon sell it and apply the proceeds upon the debt which he represents. If the property has been consumed, or for any reason cannot be identified or followed, he can, in the same action, compel those legally responsible to account for it and pay over the value thereof to the extent necessary to satisfy the debt or debts represented by him, as well as the costs and expenses. He cannot, however, uphold an action at law for the conversion of property transferred, even in fraud of creditors, before he was appointed receiver, because that is not "the property of the judgment debtor" within the meaning of section 2468 of the Code of Civil Procedure, which is the source of his power. *Ward v. Petrie*, 157 N. Y., 301; *Pettibone v. Drakeford*, 37 Hun, 628.

The title of the plaintiff is not strengthened, nor is his power increased by the act of 1858 "to declare and extend the powers of executors, assignees, receivers and other trustees" (L. 1858, ch. 314; L. 1894, ch. 740). While the language of the statute is general in form, it obviously includes only such trustees as take the entire estate for the benefit of all the creditors, whereas a receiver in supplemen-

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tary proceedings represents simply the creditor who brought about his appointment and such as caused the receivership to be extended to their claims, each of whom is entitled to payment in full in the order of diligence in instituting proceedings (Code Civ. Proc., §§ 2466, 2469). The object of the one statute is to secure distribution of all the effects of an insolvent, without any preference except such as is required by law, and of the other to simply collect the debt of a single creditor in full, and if there is anything left, another creditor, by prompt action, may secure enough to pay his debt, and so on, in the order in which proceedings were begun. The Legislature, by classifying certain receivers with executors and others, who take the entire estate for the benefit of all creditors, indicated an intention to include only such receivers as take all, for the benefit of all, and not those who take all or a part, as the case may be, for the benefit of one only (*Bostwick v. Menck*, supra). The statute provides that "any executor, administrator, receiver, assignee or trustee of an estate, or the property and effects of an insolvent estate, corporation, association, partnership or individual, may, for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm, treat as void and resist all acts done, transfers and agreements made, in fraud of the rights of any creditor, including themselves and others, interested in any estate or property held by or of right belonging to any such trustee or estate." As was said in *Pettibone v. Drakeford* (supra), "these words necessarily imply a receivership of the whole estate and not of a part." This theory is confirmed and the method of attack is indicated by the next sentence of the act, which provides that "any creditor of a

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deceased insolvent debtor, having a claim or demand against the estate of such deceased debtor exceeding in amount the sum of \$100, may, in like manner, for the benefit of himself and other creditors interested in the estate or property of such deceased debtor, disaffirm, treat as void and resist all acts done, and conveyances, transfers and agreements made, in fraud of the right of any creditor or creditors, by such deceased debtor, and for that purpose may maintain any necessary action to set aside such acts, conveyances, transfers or agreements; and, for the purpose of maintaining such action, it shall not be necessary for such creditor to have obtained a judgment upon his claim or demand, but such claim or demand, if disputed, may be proved and established upon the trial of such action."

We think that the act of 1858, as amended in 1894, does not apply to receivers appointed in proceedings supplementary to execution.

The claim of the respondent that the judgment should be affirmed because the evidence is sufficient to support a bill in equity is not well founded. The complaint is in the form of a pure action at law to recover damages for the conversion of personal property, with no allegation to suggest a court of equity as the forum resorted to, except those essential to show the appointment of the plaintiff as receiver, and hence that he had a legal capacity to sue. The plaintiff alleged that the defendants took possession of the property in question and "unlawfully converted and disposed of the same to their own use," and that the damages sustained thereby amounted to \$3,000. The only relief demanded is for the recovery of that sum and costs. There is not even a prayer for general relief. The trial was had

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without objection, in the usual way, before a jury; the verdict rendered was simply for a definite sum of money, and when the defendants moved to dismiss because the plaintiff had mistaken his remedy, as an action at law would not lie, no suggestion was made that the Court should grant relief in equity, and no such relief was granted. The fact that the judgment-roll, execution and return thereof were read in evidence without objection did not authorize the Court to award equitable relief, as such evidence was not received for that purpose, but simply to show that the plaintiff was duly appointed receiver. No motion was made to amend the complaint, and it stands as it was drawn, a pleading in a strict action at law.

The theory of the action as gathered from the complaint, the method of trial and the practice followed throughout the history of the case have fastened it unchangeably on the law side of the Court. It was brought there and tried there, and there it must remain, so far, at least, as this appeal is concerned.

We think that the judgment should be reversed and a new trial granted, with costs to abide the event.

BARTLETT, J. (dissenting).—The plaintiff, as a receiver in supplementary proceedings, representing a creditor of the McCall Publishing Company, recovered a judgment against the Meriden Britannia Company for \$900 and interest, the amount received on the sale of property belonging to the McCall Company, which the Britannia Company had wrongfully converted to its own use. The Appellate Division, First Department, sustained the recovery,

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and I agree with the reasoning of that learned Court.

The precise question here presented lies within a very narrow compass.

The chattel mortgage given by the McCall Company to the Britannia Company was "absolutely void as against the creditors of the mortgagor," in the language of the statute (Laws 1833, chap. 279, § 1), there having been neither actual and continued change of possession of the property nor a filing of the instrument.

The plaintiff represents a judgment of about \$1,700, and seeks to apply thereon the sum of \$900 in the custody of the fraudulent mortgagee, who took possession of the property under the provisions of the chattel mortgage and sold it.

It is to be observed that here is a question between a judgment creditor, as to whom the statute says this mortgage is "absolutely void," and a fraudulent mortgagee, who holds money to all of which the plaintiff is entitled, as it is less than the judgment he represents as receiver. There is no complainant creditor—no innocent third party—seeking to enforce his claim, and the bald question is whether the receiver, as between himself and the mortgagee, can treat this mortgage as "absolutely void," as the statute declares it to be, and reach the proceeds of a conversion in an action at law which is insufficient to pay his judgment, or whether he is driven to the empty form of an action in equity to set aside an instrument which, as to him, under these peculiar circumstances, is waste paper. In other words, is the mortgage to be held voidable only as to him, although the statute says it is "absolutely void?"

I am of opinion that, as between this judgment

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creditor and mortgagee, the title to the mortgaged property never, in law, passed out of the McCall Company, and, if the latter had sold the same and received of proceeds twice the amount of the judgment now sought to be collected, the plaintiff could have recovered the full amount of the judgment and interest. *Bostwick v. Menck*, 40 N. Y., 383.

The counsel for the plaintiff did, indeed, sue for \$3,000, the alleged value of the property, but at the trial he limited the recovery to the amount of \$900 realized by the mortgagee at the sale, thus presenting the question, as between the judgment creditor and mortgagee, divested of the rights of third parties.

The language of Judge Peckham, in *Stephens v. Perrine* (143 N. Y., 476), is very much in point.

That learned Judge said, in referring to an unfiled chattel mortgage like the one at bar: "The mortgage, as to the creditors of the mortgagor, was always void. It continued to be void notwithstanding the fact that the mortgagee assumed to take possession under and to sell the property by virtue of such void instrument. As between these mortgagors and creditors it was the same as if the mortgage did not exist, and the mortgagee could not, as against these creditors, obtain any rights under it. * * * As against them the mortgagee could not rightfully take the property by virtue of this void instrument, and if she did take in spite of the fact that the mortgage was void and no protection to her, how could she secure any further or greater right by the sale of the property and the receipt of its value? * * * If void, what right has the mortgagee, as against creditors, to take possession in her character of mortgagee and to sell or dispose of property described in it? Clearly, she

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has none, and she does not acquire any by the celerity of her movements in seizing and selling property under it."

It is true that the precise question now presented to the Court as to remedy was not up in the case last cited, but this fact does not render the reasoning in the foregoing quotation any the less cogent.

That action was brought by a receiver in supplementary proceedings to set aside a chattel mortgage and to recover the property covered by it or its value, and it was sustained.

Under the peculiar facts of the case at bar, the statement that the mortgage was valid as between the parties and as to all the world, except creditors of mortgagor, has no controlling force—the plaintiff was entitled to all the proceeds of the conversion, and no third party had a valid claim.

The judgment creditor represented by the plaintiff was, under the facts disclosed, entitled to act as if the mortgage never existed and treat the mortgagee as a naked trespasser in entering upon the premises of the McCall Company and converting its property. This was his statutory right and not a cause of action that he derived from the judgment debtor. The action before us is one in which the judgment debtor never had part or lot, and the fact that the mortgage was valid as between the mortgagor and mortgagee is immaterial.

In *Mandeville v. Avery* (124 N. Y., 376) this Court held that the term "creditors" includes all persons who were such while the chattels remained in the possession of the mortgagor under the agreement, and their rights are not affected by the fact that they did not obtain judgment, or a specific lien, until after delivery of property to the mortgagee;

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that the right of the creditor to collect his debt out of the mortgaged chattels may not be defeated by the mortgagee, simply by selling the property. The Court said (p. 387): "The mortgage being void, all proceedings under it were void, and, although he (the mortgagee) may possess an honest claim, he cannot retain property obtained by him under a fraudulent mortgage against a pursuing creditor."

It is also true in the case last cited that the question now presented as to the form of the remedy was not up, but the reasoning proceeds upon the assumption that, as to the creditor, the mortgage is as if it never existed.

It was an action in equity to set aside the mortgage and compel defendant to account for proceeds.

It is insisted by the appellant that the case of *Ward v. Petrie* (157 N. Y., 301) is an authority against the maintenance of such an action as this. The precise question decided in that case was that a receiver in supplementary proceedings has no authority as such to maintain an action at law to recover damages from the judgment debtor, and another for a fraudulent conspiracy to prevent the collection of the judgment creditor's debt, carried into effect before the entry of judgment and the commencement of the proceedings which resulted in the appointment of the receiver. It is true that in the opinion of the case last cited it is said: "The title to property, however, transferred by the judgment debtor in fraud of creditors, prior to the service of the order for examination upon him, is good as against the receiver until he has caused the transfer to be set aside by a decree in equity." and cites *Bostwick v. Menck* (40 N. Y., 383).

Bostwick v. Menck was an action brought to set

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aside a fraudulent assignment, and, consequently, the form of the action was not under consideration, and the situation in the case at bar did not exist. The point decided in that case was that a receiver in supplementary proceedings should be limited in his recovery to an amount sufficient to cover the judgment and interest, together with the costs of the proceedings, although the assigned property in the hands of the assignee was of much greater value. In the case before us this rule was observed.

It was held nearly fifty years ago in this Court, in the case of *Porter v. Clark* (9 N. Y., 142), that "the receiver appointed under supplementary proceedings does not stand merely in the place of the debtor, but represents the creditors, and can thus impeach the fraudulent sales of the debtor. The assignment sought to be set aside in this case was good between the parties. The fraudulent grantor could not impeach his own grant. * * * But the receiver, succeeding to the rights of the debtor, represents other interests than those of the debtor. He comes in by the act of the law and not by the act of the party."

In the case at bar, the receiver does not stand in the shoes of the judgment debtor, but is seeking to enforce a remedy conferred upon him by the statute: Laws 1833, ch. 279, § 1.

In attacking voidable instruments, a receiver is clothed with all the rights of the judgment debtor and judgment creditor, and, as to instruments absolutely void as to creditors, the receiver may, as the creditor might, as between himself and the fraudulent mortgagee, treat the instrument as waste paper, and proceed as if the property sought to be conveyed by it had never left the possession of the mortgagor

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or grantor except by the wrongful act of the mortgagee, and maintain an action for conversion.

I am of opinion that this plaintiff might rely upon the act of 1858 (ch. 314) to sustain his present position, but do not deem it necessary to consider that question, as his cause of action is complete without it.

This action is clearly maintainable on principle, and there is no case in this Court that has been brought to my attention that is authority to the contrary.

I vote for the affirmance of the judgment.

PARKER, Ch. J.; O'BRIEN, HAIGHT and MARTIN, JJ., concur with VANN, J., for reversal, etc. GRAY, J., concurs with BARTLETT, J., for affirmance.

Judgment reversed, etc.

THE METROPOLITAN STREET RAILWAY,
PLAINTIFF IN ERROR, v. ANNE M. GUMBY,
DEFENDANT IN ERROR.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT, JANUARY, 1900.

§ 830.

Deceased witness — Absence of privity to render testimony on former trial competent.

In the trial of an action by a parent for loss of services of an infant child through personal injury caused by defendant's alleged negligence, it is not competent to read in evidence the testimony of a deceased witness, given on the trial of another action brought by a guardian ad litem in the infant's behalf

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against the same defendant, to recover for the infant's pain, suffering and any permanent loss of ability to work caused by the accident.

(Decided January, 1900.)

Error to the Circuit Court of the United States for the Southern District of New York.

This is a writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of defendant in error, who was plaintiff below. The judgment was based upon a verdict against defendant below awarding damages for loss of services of plaintiff's son, George Gumby, a child five years of age at the time of the accident, who was injured by one of defendant's cars. May 22, 1897. The facts sufficiently appear in the opinion.

Charles F. Brown, for plaintiff in error.

M. P. O'Connor, for defendant in error.

LACOMBE, Circuit Judge.—All assignments of error, save one, were abandoned by plaintiff in error upon the argument, and that one only need be discussed. One of the eye-witnesses of the accident was Macon Lyons. He was dead at the time of the trial of the cause at bar, but had testified with great fullness to what he saw of the accident upon the trial of an action brought by Elizabeth Clayton, grandmother of George Gumby, as guardian ad litem, against the same defendant, to recover for his pain and suffering and for any permanent loss of ability to work caused by the accident. After introducing some testimony, which is not specially persuasive, plaintiff's counsel offered to read the testimony of Lyons taken in the son's action. It would appear from the record that the attention of the trial Judge

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was not, at the time, called to the circumstance that the guardian ad litem who prosecuted the former action, was not the infant's mother (the present plaintiff), but his grandmother. Defendant objected that he knew of no rule of law that made it competent testimony. The objection was overruled and the testimony read, defendant reserving an exception. The objection is not formulated in specific terms, to the effect that what was offered was hearsay and not within any of the exceptions which are recognized to the rule that hearsay is incompetent. Nevertheless, since the objection urged here is of such sort that nothing could have been done by the party offering the evidence to overcome such objection, we may with entire propriety dispose of the question raised here.

The statutes of New York (§ 830, Code of Civil Procedure) provide that: "Where a party or a witness has died or become insane since the trial of an action * * * the testimony of the deceased or insane person * * * taken or read in evidence at the former trial * * * may be given or read in evidence at a new trial * * * subject to any other legal objections to the competency of the witness, or to any legal objection to testimony or any question put to him." It is manifest that this does not touch the point at issue; it provides only for new trials of the same action in which the deceased witness testified. We find no other section of the Code authorizing the admission of such testimony, and the question raised here will have to be disposed of under the principles of the common law.

The entire reliance of the plaintiff seems to be upon a paragraph in the sixteenth edition of Greenleaf on Evidence, enlarged and annotated by Prof.

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Wigmore (published 1899). The paragraph (which is the annotator's) is section 163a, and reads as follows:

"As to the parties, all that is essential is that the present opponent should have had a fair opportunity of cross-examination; consequently a change of parties, which does not effect such a loss does not prevent the use of the testimony—as, for example, a change by which one of the opponents is omitted, or by which a merely nominal party is added; and the principle also admits the testimony where the parties, though not the same, are so privy in interest—as where one was an executor or perhaps a grantor—that the same motive and need for cross-examination existed."

A very large number of cases are cited by the annotator, all of which have been examined by the Court.

If the propositions above quoted are read with the qualifications which are indicated by the illustrative examples given in the paragraph, they are sound and abundantly supported by authority. If they are to be read, however, as plaintiff reads them, namely, as asserting that evidence of a deceased witness may be read in any subsequent suit when it appears that the same issue is involved, that the witness testified under the sanction of an oath, that he was confronted with the person against whom the testimony is offered, and that the latter had the opportunity of cross-examination—then it is not supported by the authorities to which our attention has been called or which we have been able to discover. Stated thus baldly the proposition imports that when, for example, the derailment of a train because of a misplaced switch has caused injury to a score of passen-

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gers and a witness has testified to the circumstances of the accident in an action brought by A to recover for his injuries and has since died, the evidence of such witness may be read by any other injured passenger upon the subsequent trial of his action for damages. No case has been found which lends the slightest support to any such proposition. In all of them it is postulated that the parties must be substantially the same, or, if they are not, that the newcomer must be a privy with the former party in blood, in estate or in law. There seems to have been some relaxation of the rule in criminal causes. Thus, in *Charlesworth v. Tinker* (18 Wisc., 633), the deceased witness had testified on a prosecution of defendant for assault, and the testimony was read upon the trial of a civil action against the same defendant for the same assault. The Court places its decision on the ground that, under the statutes of Wisconsin, the complainant in a criminal prosecution for an assault and battery has control of the prosecution, and may examine all witnesses sworn at the trial. In *Regina v. Beeston* (29 Eng. L. & E., 529) the deposition of a wounded person, taken before the magistrate in presence of the prisoner (charged with assault with intent, etc.), and where the prisoner has the opportunity of cross-examination, was held admissible on the trial of an indictment for murder, the assaulted person having died. Here the real question is as to identity of the issue, the parties were the same — the Queen and the prisoner (see, also, *Summons v. State*, 5 Ohio State Rep., 343). A case which seems to lend some support to plaintiff's contention is *Kreuger v. Sylvester* (100 Iowa, 647), where, upon the trial of a civil action for assault, the evidence of a deceased witness given

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on the trial of an indictment for the assault was held admissible. The opinion is very brief, there is no discussion of the subject and the only citations given are Greenleaf (§ 164), which sustains no such proposition, and Charlesworth v. Tinker (supra). The decision is so opposed to the almost universal body of authority as to be entirely unpersuasive.

A few citations from reported opinions in civil causes will indicate the firmness with which the rule is adhered to that the parties must be substantially the same or privies in blood, in law or in estate. The testimony is either held to be competent, because such privity is found to exist, or is held incompetent because no privity is established.

In McDonald v. Cutter, executor of Robinson ([Cal.] 52 Pac., 120), Melone brought an action against Meyers to foreclose a lien on certain bonds. McDonald, who had bought the bonds at a sale by Meyer's assignee in insolvency, was substituted as defendant. Robinson, to whom Meyers had transferred the bonds before petition in insolvency was filed, and who claimed to own them, paid plaintiff's claim and secured a dismissal of that action. Held that Robinson was not subrogated to plaintiff's (Melone's) rights so as to render a deposition of deceased witness taken in Melone's suit admissible in a subsequent action between McDonald and Robinson's executor.

In L. & N. R. R. v. Atkins (2 Lea, Tenn., 248), it is held that judgment in favor of defendant, in a suit brought by husband and wife, is ordinarily no bar to a suit brought by the husband alone, nor are depositions taken in the first suit admissible as evidence in the other. Wharton, in his work on Evidence (§ 177), states the rule thus: "Whenever a judg-

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ment in one cause would be evidence in the other cause, there evidence of the deceased witness may be reproduced, the witness having been open to cross-examination." Several authorities support his proposition that the test to be applied is the same as that used when a prior adjudication is offered as evidence.

In *Goodlett v. Kelly* (74 Ala., 220), the Court, admitting the testimony, says: "The subject of the controversy in the two suits is the same, involving the title to the same tract of realty, and the parties are the same, excepting only one, who claims title through privity with the plaintiffs in the former suit." To the same effect is *Wells, adm'r, v. Am. Mortgage Co.* (109 Ala.,). In *Smith v. Keyser, exrx.* (115 Ala., 455), the first suit was an action of ejectment brought by plaintiff in her individual capacity against a tenant in possession; the second suit was an action in ejectment brought by the same plaintiff, as executrix, against the same defendant and his landlord, for recovery of the same lands. Held, competent; "the matters in issue and the parties are essentially the same in both actions—parties as thus used comprehending privies in blood, in law or in estate."

Hulin v. Powell (3 C. & K., 323) was an action of ejectment against Powell, Vaughan Williams, J., says: "I understand the facts to be that a former ejectment having been commenced against Mr. Richards, he agreed with Mr. Powell to defend for Powell, the latter allowing him his expenses, so that Powell was substantially defendant in that action. The admissibility of depositions in cases of this kind does not depend upon technical grounds; and one question is: Had the lessor of the plaintiff an oppor-

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tunity of cross-examining the witness? He certainly had, and I see no fair reason for supposing that the cross-examination would have been to a different effect whether the lessor of the plaintiff knew or did not know that Mr. Powell was the real defendant. The lessor of the plaintiff had to succeed by the goodness of his own title, and who was the defendant would be of little importance. * * * The matter may not be free from some doubt, but, on the whole, I am of opinion that the evidence is receivable."

In *Llanover v. Hemfray* (L. R., 19 C. D., 229), the former suit was a bill of peace brought in 1815 by some of the tenants in behalf of themselves and all others against the lord of the manor. Testimony was taken therein *de bene esse*, defendant joining.

Jessel, M. R.: "The question has been raised whether this testimony is admissible in the present suit. I must say I have no doubt whatever that it is. The suit of *Moggridge v. Hall* was a suit by persons who were privies in estate with the present tenants; they were not, indeed, owners of the same estate, but as the suit was on behalf of all the tenants it included the then owners of the estate now belonging to the Messrs. Phillips, and, on the other side, there was a lord of the manor, who is now represented by the present lord of the manor. Therefore, it was a suit between persons privy in estate to the parties in the present action. The issue in that suit was the same as that in the present action, and the evidence in one is therefore admissible in the other."

In *Wright v. Cumpsty* (41 Penn., 102) the questions raised were the same as in a former suit, viz.: Whether or not a partnership existed between plaintiff and defendant and to what extent; and whether the purchase of a steamboat was in the pur-

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chaser's own right or in trust. The Court says: "We think the identity of the subject-matter in dispute was the same in both actions, and so were the parties, excepting that, owing to the nature of the action, being replevin, a stranger to the contract which was involved in that controversy was included, but the parties here were parties plaintiff and defendant there, and we think the identity is sufficient, and brings the admission of the evidence within the ruling in *Ins. Co. v. Johnson* (11 Harris, 72) and in *Haupt v. Henninger* (1 Wright, 138)."

In *Orr v. Hadley* (36 N. H., 575) the Court says: "As a general rule, the parties must be the same and the point in issue must be the same. It is not required, however, that the parties to the second suit should be literally the same as in the first; for, if the trial is between those who represent the parties to the first by privity in law, in blood or in estate, the evidence is admissible. In *Wilbur v. Selden* (6 Cow., 162) the parties in the former suit were Wilbur & Doremas against Selden, Richards & Ogden; in the second they were Wilbur, survivor of Doremas, against Selden, impleaded with Richards, survivor of Ogden—and it was held that the parties were substantially the same. * * * But the testimony offered in this case was not admissible according to any of the authorities which we have examined. The parties in the present suit are not the same as in the former, nor are they in privity with them so as to be bound by what was said and done in that action. Peter E. Hadley, one of the present defendants, was plaintiff in that suit, but the other defendant so far as the case shows, had no connection with that proceeding, either as party or privy. He had no opportunity to cross-examine

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the witness and his rights cannot be affected by the testimony in that cause. There are cases which hold that where the number of the parties is reduced in the second suit, the identity of those which remain being retained, the testimony may be used (*Wright v. Tatham*, 1 Ad. & El., 3; *Wilbur v. Selden*, supra). But we have found no case where the testimony has been admitted, if new parties, who are not privies, are introduced in the second suit."

Strutt v. Bovingdon and two others (5 Esp. N. C., 56) was an action for diverting water from the plaintiff's mills. In 1784 "the present plaintiff had brought another action against the defendant, *Bovingdon*, in which he had relied on the same rights." Testimony of a deceased witness on the former trial was held to be competent even against the two new defendants for the reason, as stated by Lord Ellenborough, that "the two defendants on this record justified under the defendant, *Bovingdon*, who was seized of the land." See, also, *Wright v. Tatham*, 1 Ad. & El., 3, and *Warren v. Nichols*, 6 Metcalf, 261.

Boardman v. Reed (6 Peters, 327) was an action of ejectment. Defendant's counsel offered to prove that on the trial of a former action of ejectment, brought by the present lessor of the plaintiffs against some of the defendants in the present action, to recover the land now in controversy, a witness on that trial, who had since died, swore to a certain corner tree. "As the testimony of the witness," says the Court, "was not given between the same parties, his statement, if admissible, could only be received as hearsay."

Testimony of a deceased witness was received in *Yale, Jr., v. Comstock* (112 Mass., 267), because the "parties in the latter suit derived their titles respect-

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ively from Allen S. Yale and Marshall Brace (the parties to the earlier suit) and as to them are privies in estate."

In *Jackson v. Lawson* (15 Johns., 539), A devised a farm to his wife during widowhood, remainder to his children; B, claiming under a deed from A, brought ejectment against the widow and another, and recovered on oral proof of the contents of the deed, which was lost. The widow died, and C, a grantee of some of the devisees, brought ejectment against B. The testimony of a deceased witness on the former trial to the contents of the deed was admitted. The Court, by Van Ness, J., says: "Both the widow of Lawson and the lessor of the plaintiff thus claim under the same will; and I am inclined to think that there is such a privity of estate between them; and the verdict in that case was, for certain purposes, evidence (though not conclusive) in this. * * * The estate devised to the widow during her widowhood, and the remainder over, constitute but one estate carved out of the same inheritance, created and subsisting together, the one in possession, the other in expectancy. * * * If the verdict in the former ejectment was admissible on the trial of this suit, by reason that the tenants for life and the remaindermen are privies in estate, it follows that the evidence given in the first suit by a deceased witness is also admissible. The rule is that such evidence is proper not only when the point in issue is the same in a subsequent suit between the same parties, but also for or against persons standing in the relation of privies in blood, privies in estate or privies in law."

In *Jackson v. Crissey* (3 Wend., 253), the testimony was held incompetent. The Court says, per *Savage*,

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C. J.: "What a deceased witness has sworn at a former trial between the same parties in relation to the same issue is proper evidence. Under the term 'parties' are comprehended all persons standing in relation of privies in blood, privies in estate or privies in law (15 Johns., 544); but Barrett, in the suit against whom the testimony was given, was neither. He held, indeed, under the same title, that is, he derived title from Amos Miles through the deeds from his heirs to Zachariah Miles and the conveyances from the latter to Zeno Carpenter, but his lot and the premises of the defendants are separate parcels of what was once the same farm. Barrett and the defendant do not hold different estates in the same premises; neither holds as remainderman or reversioner to the other. There is, therefore, no privity of estate between them, and there is nothing in the case to show either privity in blood or privity in law."

A convenient definition of this privity which is thus made the essential element in the cases above cited is found in the Am. & Eng. Enc. Law, as follows: "The term privity denotes mutual or successive relationships to the same rights of property; and privies are distributed into several classes according to the manner of this relationship. Thus there are privies in estate as donor and donee, lessor or lessee, and joint tenants; privies in blood as heir and ancestor, and co-parceners; privies in representation as executor and testator, administrator and intestate; privies in law, where the law, without privity of blood or estate, casts the land upon another as by escheat."

Manifestly no such mutual or successive relationship exists between the infant claiming damages for

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his pain and suffering and his mother claiming damages for the loss of his services. The causes of action are distinct, and neither claimant could, under any circumstances, succeed to the other's cause of action. There is a case in 53 Indiana, 143 (Ind. & St. Louis R. R. v. Stout, adm'r), where this distinction seems to be overlooked. Peter Stout sued in his lifetime for damages to himself from some accident, which action abated by his death. Thereafter Stout, administrator, sued under the statute for injury causing death, and offered the testimony of a deceased witness who testified on the trial of Peter's case. Although the Court seems to appreciate the circumstance that one action was based upon the common-law liability and the other upon the statute, it nevertheless holds the evidence competent, since "our statute makes the administrator the representative of the deceased," citing only Greenleaf (§ 164), which extends the word parties only to comprehend privies in blood, in law or in estate. The case is not well reasoned, and seems to be unsupported by authority. The General Term, in the Fourth Department, held the precise converse in *Murphy v. N. Y. C. R. R.* (31 Hun, 358), which was an administrator's action for injuries causing death, in these words: "The deposition of the deceased taken in the action prosecuted by him in his lifetime was not competent evidence in the action. That action terminated with the death of the plaintiff therein and all interlocutory proceedings went down with it, and are not saved by section 881 of the Code of Civil Procedure. While the plaintiff is the personal representative of the deceased, the action is prosecuted for the benefit of those who do not claim under him, but is an original

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cause of action, that did not exist in the lifetime of the deceased."

It should further be noted that testimony of a witness on a former trial cannot be admitted against one of the parties to a subsequent trial, unless it could be admitted against the other. In *Atkins v. Humphreys* (1 M. & Rob., 528), plaintiff sued to set aside a conveyance as fraudulent and collusive. In a former suit one Stewart had sued the same defendants to set aside the same conveyance on the same grounds. Tindal, C. J., *loquitur*: "I cannot receive the evidence. There is no reciprocity. If the present defendants had offered depositions taken in the earlier suit the plaintiffs would have been entitled to object." *Morgan v. Nicholl* (L. R., 2 Civ. Proc., 117) was an action of ejectment. Morgan offered the testimony of a deceased witness on the trial of a former action in ejectment against Nicholl's father brought by Morgan's son, claiming as his heir-at-law under the supposition that he was dead, to recover the same premises. It was held that there was no privity of estate between Morgan and his son and that the evidence, not being admissible against Morgan, was not admissible for him. Willes, J., says: "The contention of the plaintiff amounts to this, that the rule — that evidence given in a former trial upon the same matter and between the same parties, or persons privy to them, is admissible — extends to all cases in which the parties to the two trials are related in blood. The only relation between the plaintiffs in this and the former action is one of blood, a close one, it is true, but I apprehend the law must be the same as if the plaintiffs had been cousins deriving their title from the same person — a *reductio ad absurdum*. By persons

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privity to the former parties is really meant persons claiming under them. Could it be said that this evidence would have been admissible, if the former action had turned on whether the then plaintiff was the oldest son or whether he was legitimate? It is contended that it is not necessary that the parties should be exactly the same, but here the two plaintiffs, for purposes of title, are entire strangers. The cases are collected in *Wright v. Tatham* (supra), and that case shows that it is sufficient if the parties to the second cause were parties to the first, though there were other parties joined with them.

"I agree also with the Lord Chief Justice that the same rule applies as in cases of *res adjudicata* and *estoppel*, viz.: That the evidence cannot be admissible against one party and not against the other; and it is clear that if this evidence had been tendered by the defendant, the plaintiff would have said that he was not present at the former trial, and did not claim under the former plaintiff."

This case is on all fours with the one at bar. Anne Gumby could have successfully objected to the reading in evidence against her of the testimony of the witness who testified in the suit of Clayton, guardian ad litem of George Gumby, against defendant, and, therefore, she cannot read the same testimony in evidence against defendant.

The judgment of the Circuit Court is reversed and new trial ordered.

SHIPMAN, J., concurred.

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DAVID L. MAYER, RESPONDENT, v. WILLIAM
FRIEDMAN.

SUPREME COURT, SPECIAL TERM, KINGS COUNTY.

§§ 3044, 3067, 3251.

Municipal Courts — Costs on appeal.

Section 1367 of the charter of Greater New York and sections 3044 to 3067 of the Code of Civil Procedure, and section 3251 of the Code of Civil Procedure construed:

The costs on appeal to the Appellate Division from a judgment of the Municipal Court are \$25 on affirmance, besides disbursements.

Disbursements for printing briefs on appeal from a judgment of the Municipal Court to the Appellate Division cannot be taxed as a necessary disbursement.

(Decided January, 1900.)

Appeal from the Municipal Court of the City of New York. Motion by the respondent for a retaxation of his costs of appeal, the judgment having been affirmed.

Ira Leo Bamberger, for the motion.

W. J. Mayce, opposed.

GAYNOR, J.— By section 1367 of the charter of the city of New York appeals from judgments in the Municipal Court of that city must be taken “in the manner prescribed in articles 1 and 2 of title 8 of chapter 19 of the Code of Civil Procedure” (§§ 3044 to 3067, inclusive), but to the Supreme Court instead of to a County Court. Those sections provide for and regulate appeals, and the costs of appeals from Justices of the Peace to County Courts. The county

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of New York, having no County Court, appeals from the Municipal Court (corresponding to Justices' Courts) are required to be taken to the Supreme Court; and this applies to the whole city for the sake of uniformity, although there are County Courts in parts of the city, viz.: In the counties of Kings, Queens and Richmond. The said section 3067 of the Code of Civil Procedure provides that the respondent on an appeal "provided for in this article" shall, on affirmance, be entitled to \$25 costs, besides disbursements. The respondent here claims, however, that such provision for costs does not apply, but that this appeal comes under section 3251, which prescribes costs on appeals "to the Supreme Court from an inferior Court," and would give the respondent \$20 before argument, \$40 for argument, and \$10 term fee for each term the cause was necessarily on the calendar of the Appellate Court. I do not think this can be so. The said section 3067 prescribes the costs for appeals taken under the article of which it is part. That such appeals in the city of New York are taken to the Supreme Court instead of to a County Court does not matter. The costs thereof are prescribed by section 3067 all the same. By changing such appeals to the Supreme Court for lack of a County Court in New York county there was no intention to change the provision in respect of costs. Nor can the respondent tax disbursements for printing a brief. There is no law or rule requiring the briefs on such appeals to be printed.

Motion denied, with \$10 costs.

Matter of McNamara.

**IN THE MATTER OF FRANK R. MCNAMARA, A
BANKRUPT.****DISTRICT COURT OF THE UNITED STATES, NORTHERN
DISTRICT OF NEW YORK, JANUARY, 1900.****§ 1871.***Bankruptcy — Suit by trustee which judgment creditor might have brought before bankruptcy.*

A suit brought after the bankruptcy by an execution creditor, to establish a lien on equitable assets of the bankrupt, is in reality founded on a judgment against the bankrupt, and, therefore, will be held "founded on a claim from which a discharge will be a release." Sec. 11a.

The trustee, while standing in the shoes of the bankrupt, and not strictly a judgment creditor, may yet bring any action which a judgment creditor might have brought before the bankruptcy. This is more emphatically so since section 70e of the present act.

In certain cases, as, for instance, where there are no assets with which to pay for the litigation, or where the same is speculative of doubtful outcome, or where apparently only one creditor is interested, it is proper, on notice to all creditors, that a single creditor or class of creditors desires to conduct such litigation through the trustee, and that only such creditors as share in the expense shall share in the recovery, to order a suit brought for the benefit of creditors so sharing and to dispose of the proceeds accordingly. This case held one in which such a practice should be followed.

In re Collins (Fed. Cas., No. 3,007) and Cook v. Whipple (55 N. Y., 150), distinguished.

(Decided January, 1900.)

Suit by trustee, which judgment creditor might have brought before bankruptcy.

The facts appear in the opinion.

Shire & Jellinek, for the bankrupt.

Tuttle & Callan, for F. G. Liemberner, an execution creditor, opposed.

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WILLIAM H. HOTCHKISS, Referee.—The facts at bar are somewhat peculiar. On January 4, 1898, the creditor herein obtained and docketed a judgment against the present bankrupt for \$1,196.86. Previous to that time, McNamara had conveyed a piece of property in Buffalo to one Jennie Wells under an agreement that the same should be reconveyed to him after certain moneys, which had been advanced to him by A. Judson Wells, the husband of Jennie Wells, had been repaid. Later such indebtedness was repaid. About the time of the first transaction, A. Judson Wells also purchased a mortgage on another piece of property belonging to McNamara under an arrangement with him whereby he was to foreclose, take title to and sell the same, and, after reimbursing himself from the property, hold what might be left for the benefit of McNamara and reconvey it when requested to do so. In November, 1898, McNamara brought an action to compel such reconveyance, after which and in settlement of such action the two properties, at the request of McNamara, and without apparent consideration, were conveyed to Mary E. McNamara, his wife, who now holds title to the same. Subsequently she incumbered one piece by a mortgage for \$1,000.

It seems that these facts did not become known to the creditor, Liemberner, until September, 1898. He then took out an execution against McNamara and on its being returned unsatisfied, on November 2, 1898, began a proceeding supplementary to an execution, as provided in the New York Code. On December 19, 1899, on the facts here stated and other facts elicited on the examination in supplementary proceedings, he began an action in the

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Supreme Court of New York against the McNamaras, husband and wife, and John S. Rockwell, the mortgagee, to the end that the title to these properties be adjudged in the present bankrupt as of the date of the docket of the creditor's judgment, charged with the lien thereof, and that the two transfers to Mary E. McNamara and her subsequent mortgage be set aside, as intended to hinder, delay and defraud creditors.

The adjudication in bankruptcy was on the voluntary petition of the bankrupt and was made December 9, 1899. Two days thereafter, at the instance of the bankrupt, I granted the usual restraining order against the Liemberner supplementary proceedings, coupled with an order returnable before the district Judge, requiring the creditor to show cause why the stay should not be continued for twelve months, etc., as provided in the act. This show cause was, by stipulation, brought on before me, instead of the district Judge. The question at issue, therefore, is, should the stay be continued? In other words, should a suit be begun and conducted by the trustee for all the creditors, or the present action be continued by one creditor alone? The property involved is worth no more, and, probably less, than the amount of Liemberner's judgment, so that if his lien be first and good, which, so far as the motion goes, seems to be admitted, there will be nothing to pay over to the trustee, should the creditor be successful in his suit, and no duty to be performed by the trustee, save payment to one creditor in case the trustee should bring the action and win. In such a state of facts, should the Federal Courts interfere?

The bankrupt, at the outset, charges the creditor

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with a technical contempt of Court, in that, after the restraining order of December 9, 1899, which temporarily stayed all proceedings under the Liemberner judgment, the creditor brought the action of December 19, 1899, which was necessarily founded on the judgment, even though not in all essentials the equivalent of a creditor's bill, or a judgment creditor's action under section 1871 of the New York Code. I prefer, however, to decide the motion on broader grounds. The creditor insists, on the other hand, that the pending action is not "a suit founded on a claim from which a discharge would be a release," being merely to establish a lien in law where, it is claimed, one already exists in equity. But the convenient remedy of substituting the trustee for the creditor plaintiff (§ 11c) is not available in this case, the action having been begun since the adjudication; and it might, in some cases, entirely subvert the purpose of the act if, with full knowledge of the bankruptcy, a lien-creditor could, by beginning an action, be permitted to entrench himself behind a narrow interpretation of a somewhat ambiguous phrase, and bid the representative of the general creditors go about his business. That such a danger does not exist here, owing to a deficiency in value after this creditor's lien shall be paid, is not sufficient reason for a precedent which in most cases would prove troublesome. Under the present law, therefore, there is much reason for a holding that, inasmuch as the suit rests on a judgment, which will be discharged in bankruptcy, it is founded on a claim from which a discharge would be a release. I so hold.

The execution creditor also insists that this stay should be vacated, for two reasons, viz.: (1) As a mat-

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ter of law, that the trustee cannot bring such an action as that now pending; and (2), as a matter of expediency, that, if he can, it will, in effect, accomplish nothing for the other creditors. Citing *Eyster v. Gaff*, 91 U. S., 521.

As to the first, while it is not necessary, for the purpose of this motion, to determine the character of the transaction in which the Wells, the McNamaras and the mortgagee were involved, yet, granting the facts in the moving papers to be true, it follows either that McNamara had, in January, 1898, a title which has not yet been transferred, save through bankruptcy, or else that the deeds to his wife were parts of a scheme fraudulent as to creditors. If the former, the trustee, on his appointment and qualification, became vested therewith, subject to any liens thereon (*Stewart v. Platt*, 101 U. S., 731; *Lynch v. Johnson*, 48 N. Y., 33), and can, of course, bring an appropriate action to assert his rights (*Carr v. Hilton*, Fed. Cas. No. 2436). If the former, it is now well settled that the trustee represents both the bankrupt and the creditors (*Upton v. Jackson*, Fed. Cas. No. 16802), and, while, as a rule, as to the bankrupt's property, he stands only in the bankrupt's shoes, yet he so far represents the general creditors that, when they wish to set aside a fraudulent conveyance, he can attack the same, even though the bankrupt could not (*In re Leland*, Fed. Cas. No. 8230; *Bradshaw v. Klein*, Fed. Cas. No. 1790, and many other cases referred to in vol. 6, Am. Dig. [Century ed.], p. 474). Under the former act there was at first much doubt of the power of a trustee to bring a "judgment creditor's action," it being claimed that he was not a judgment creditor. That he was not seems clear, from the meaning of those

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words, and from such high authority as Mr. Justice Hunt in *In re Collins* (Fed. Cas. No. 3007), and Judge Grover in *Cook v. Whipple* (55 N. Y., 150). But these cases do not hold that the assignee (now trustee) in bankruptcy cannot bring such an action, but merely that, inasmuch as the assignee in bankruptcy takes the property in the "plight and condition" in which the bankrupt held it, the title taken is subject to an incumbrance which is valid as to all, except judgment creditors. But *Cook v. Whipple* is expressly limited by *Southard v. Benner* (72 N. Y., 424), and the authorities are overwhelmingly in favor of the trustee in bankruptcy, being so far a judgment creditor as to have a proper standing in an action to reach equities beyond the domain of legal remedies (*In re Metzger*, No. 9510; *In re Duncan*, Fed. Cas. No. 4131; *Barker v. Barker's Assignee*, Fed. Cas. No. 986). More than this, the present act seems to have settled any doubt that remained. By section 70e, the trustee "may avoid any transfer by the bankrupt which any creditor might have avoided," words which take the place of "may sue for and recover the said estate" and "prosecute and defend all suits at law or in equity" (§ 14, Act of 1867), a very significant change in phraseology. If the facts shown in the moving papers are true, the transfers from Wells and his wife to Mary E. McNamara were really transfers by the bankrupt, or else no transfers at all. If the former, this section would apply, and the trustee herein have ample authority to sue for the recovery of the property transferred. *Conysan, In re Adams*, 1 Am. B. R., 94.

Nor does the creditor's argument that he is the only person interested stand close scrutiny. The only proof before me on the subject of value is the

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affidavit of the creditor's attorney. It expresses merely his judgment. Nor is the proof concerning the lien of the creditor's judgment less one-sided. That lien may ultimately be declared void. The general creditors have the right to investigate both these matters in the forum charged with the administration of estates in bankruptcy. Nor, further, am I impressed with his contention that, granting his premises as to value and validity of lien, he will, if compelled to move through the trustee, be fighting a battle, perhaps, for the benefit of all the creditors and not for himself alone. That difficulty can be obviated by a practice herein suggested.

On the contrary, the creditor, Liemberner, by moving through the trustee, gains much. His present action, at best, can establish a lien only, which he must follow by an execution sale, and then wait through the fifteen months' redemption period before getting a title. In bankruptcy, the title can be recovered in the time taken to establish the lien, and, once recovered, the validity of the lien can be quickly established and the property sold. Still further, no receiver seems to have been appointed in the supplementary proceedings; and this creditor's action was begun ten days after the adjudication. The title to this property or to the rights of action to recover it thereby became vested in the trustee as of that date. It is at least a serious question whether this creditor could now successfully maintain his action (*Glenny v. Langdon*, 98 U. S., 20), though it is not necessary to go to the length of so holding for the purpose of deciding this motion. At worst, however, the creditor plaintiff will, through the continuance of the pending restraint, avoid a danger which seems to me serious.

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The stay should, therefore, be continued.

One of the objections most frequently urged to a bankruptcy law is that it nullifies the effect of diligence. If all must share equally, the incentive which moves the diligent creditor to get in ahead, and thus sets awry many schemes intended to delay or defraud creditors, or shuts the doors of the trader whose longer participation in business, but increases the number of the injured when the day of reckoning comes — the incentive is gone. What is everybody's business in the relation of debtor and creditor usually is nobody's. This is the basic weakness of all bankruptcy legislation. The creditor gains nothing by his superior diligence. If he employs an attorney, and through him secures permission that the trustee sue and recover goods fraudulently transferred, all the creditors get the benefit; he only his share, less his attorney's bill. After one or two experiences, the creditor previously diligent, and, therefore, accustomed to preferences perfectly legitimate, rails at the law and ceases to fight other's battles. Many such complaints reach me. They are not chargeable to the law as a system or to defects in it. They are due to defects in practice, especially in cases having no assets. It is not equity to reward the drone equally with the worker. Nor can we expect to amend human nature.

For these reasons, I have sought in this county district to establish a practice which, in certain cases in particular where the possibility of recovery was speculative or where there were no funds in an estate with which to pay the disbursements of the litigation, will result in rewarding only the diligent creditor. The case at bar is one of those cases. There are no funds on hand. If the facts before me

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are established by the trustee, he will recover certain property charged with a lien which will exhaust it. That creditor, therefore, as the case now stands, is alone interested in the outcome.

The trustee will, therefore, on receipt from the creditor, Liemberner, of a bond in \$250 to protect him against costs, bring such an action against Mary E. McNamara and the mortgagee as he may be advised. Immediately on such action being brought a general meeting of creditors will be called, at which meeting creditors who wish to join in the expense and share in the avails of such action shall signify their intention by deposits of four shares of such expenses at a rate then to be determined. Only such creditors as join in the expense will share in the proceeds. In the notice of such meeting, which need not be published, there will be a brief recital of the facts on which the trustee's suit rests, in particular the lien claimed by the creditor, Liemberner, together with a statement of the object of the meeting, and that only those creditors who participate in the expense of the suit will share in its results. Further details will be explained verbally to the attorneys interested.

It should, perhaps, be added that, did not one creditor have an apparent right to the whole estate, the proper practice would be to call a meeting to instruct the trustee to sue, all creditors wishing to participate then to indicate such wish and make their deposits. This will be the usual practice. It is not necessary to take that precaution in this case.

There is, perhaps, no direct authority for the practice here outlined. It is, however, in accordance with well-known equitable principles. When there are funds with which to pay expenses or the contest

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is not speculative, the discretion vested in the Courts may be relied on to protect the creditors as a body, either from undue litigation or indifference on the part of individuals. In other cases, especially those like that at bar, the practice here indicated, with variations to fit particular cases, may be followed.

Let a recommendation that the injunction be continued be prepared and submitted to the District Court. The trustee will also take notice of the instructions herein.

GEORGE W. SAUER, RESPONDENT, v. THE
MAYOR, ALDERMEN AND COMMONALTY OF
THE CITY OF NEW YORK, APPELLANT.

SUPREME COURT, APPELLATE DIVISION, FIRST DE-
PARTMENT, NOVEMBER, 1899.

§ 723.

Action against city for damages for construction and operation of viaduct — Diminution of easements of light, air and access — Amendment of complaint — Evidence of profits of business incompetent.

A city is liable to an abutting owner for whatever damage it may cause to him by the erection of a permanent structure for a viaduct in a public street immediately in front of and adjoining his property, which deprives him of the easements of light, air and access appurtenant to and connected therewith. The construction of a viaduct is something more than a mere change of the grade of the street.

Held, that the Trial Court had not exceeded its discretionary power in permitting the complaint to be amended by striking out causes of action for damages to the fee and for negligence, and permitting the cause of action for damages to the use and occupation to be more fully stated, it appearing that no counterclaims had been interposed by the defendant.

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In such an action evidence as to the profits which the plaintiff had made in his business, carried on in the premises in question, prior to the construction of the viaduct, and losses which he had sustained thereafter, is incompetent. The profits of a business are too uncertain, and depend upon too many contingencies, to safely be accepted as any evidence of the usable value of the property upon which the business is carried on.

(Decided November, 1899.)

Appeal from judgment entered on verdict and from an order denying a motion for a new trial.

Theodore Connolly, for appellant.

Edward C. James, for respondent.

MCLAUGHLIN, J.—The city of New York, in 1890, commenced to construct, and in 1893, completed a viaduct extending from St. Nicholas avenue through One Hundred and Fifty-fifth street to a bridge over the Harlem river. The plaintiff owned certain property situated on One Hundred and Fifty-fifth street, in front of which the viaduct passes, and this action was brought to recover the sum of \$90,000 damages alleged to have been sustained by him, upon the ground that the construction and operation of the viaduct diminished the easements of light, air and access appurtenant to and connected with his property.

The complaint contained four separate causes of action: (1) damages to the fee and to the rental value of the premises; (2) damages to plaintiff's business conducted thereon; (3) damages caused by the negligence of the city in excavating for the viaduct, and (4) damages for negligence of the city resulting in the bursting of a water meter. At the trial the complaint was amended by striking out the claim for damages to the fee and for negligence, and after

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such amendment the Trial Court held that only one cause of action was alleged, namely, for damages to the value of the use and occupation of the premises from the commencement of the construction of the viaduct to the commencement of the action. Both parties were apparently satisfied with the construction thus put upon the complaint, because neither of them excepted to the ruling; and the trial proceeded and the issues were finally submitted to the jury upon that theory, the learned trial Justice stating to the jury, at the request of the defendant's counsel, "this action is limited to rental damages which occurred, if at all, prior to November 10, 1896," and that by rental damages he meant the loss of "usable value." The jury rendered a verdict in favor of the plaintiff for \$30,000, and from the judgment entered thereon and from the order denying a motion for a new trial, the defendant has appealed. It asks for a reversal of the judgment principally upon the grounds (1) that an action of this character cannot be maintained against the city; (2) that the Court erred in permitting the trial, and in not dismissing it as to the second cause of action alleged; and (3) that the Court erred in receiving, against the defendant's objection, testimony tending to establish the profits of the plaintiff's business conducted upon the premises for a term of years immediately preceding the construction of the viaduct, and that for a number of years following its construction he had sustained a loss.

As to the first ground of error alleged, we think it cannot be seriously questioned but that the city is liable to an abutting owner for whatever damage it may cause to him by the erection of a permanent structure in a public street immediately in front of

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and adjoining his property, which deprives him of the easements of light, air and access appurtenant to and connected therewith. Easements of this character are property (*Kane v. El. Ry.*, 125 N. Y., 164), and property cannot be taken from the owner "for a public use without just compensation" (Constitution, art. 1, § 6). The right to maintain an action to recover damages for the invasion of the owner's rights by the city in this way is, in all respects, analogous to the elevated railroad cases, and we think the principle there applied must be applied here against the city. The construction of the viaduct was something more than a mere change of the grade of the street (*Man. Ry. v. Mayor*, 89 Hun, 429). It was the appropriation of the street itself in such a way that the plaintiff was deprived of his property, for which the city must pay a just compensation.

Neither do we think it can be seriously questioned but that the Trial Court had the power to permit the complaint to be amended by striking out the cause of action for damages to the fee and also for negligence; and to permit the cause of action for damages to the use and occupation to be more fully and amply stated (Code Civ. Proc., § 723). No counterclaims had been interposed by the defendant, and the plaintiff, therefore, had the right, with the consent of the Court, at any time before the case was finally submitted to the jury, to withdraw from their consideration any or all of the causes of action alleged. The amendment did not introduce a new cause of action. All that it did was to omit the claim for fee damages and for negligence, and to amplify or state more fully the claim for damages to the rental value. The Court so held at the time the

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amendment was made, and also held that the only recovery which could be had was for damages to the use and occupation, and that but a single cause of action was alleged in the complaint, as amended. The defendant acquiesced in these rulings and took no exception to them. It is clear, therefore, that the Court correctly denied the motion made by defendant at the close of the trial to compel plaintiff to elect upon which cause of action he would ask a verdict, and also correctly denied the motion to strike out all evidence offered as to the second cause of action. Under the previous rulings there was but one cause of action alleged in the complaint. The trial had proceeded upon that theory and the evidence which had been admitted was directed to that one issue.

This brings us to the consideration of the remaining question, which is a much more serious one, and that is, whether testimony was properly admitted as to the profits which the plaintiff had made in his business prior to the construction of the viaduct and the losses which he had sustained thereafter. The plaintiff himself was sworn and asked the following questions: "Q. Will you tell me what your annual profits were from these premises in the use and occupation of business as you carried it on during the years before the viaduct — state what it averaged annually?" and "Q. After the viaduct came there, what did your annual profits from the use and occupation of the business there average, if anything?" Both questions were objected to by the defendant upon the ground that they were irrelevant, incompetent and immaterial, and called for an improper measure of damages, which objections were overruled and an exception taken in each instance. The

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witness answered that during the four years immediately preceding the construction of the viaduct his profits averaged about \$15,000 per year, and that since its construction he had lost money each year in his business. One of plaintiff's witnesses was also permitted, against the defendant's objection, to give testimony of a similar character. We think this testimony was improperly admitted. The profits of a business are too uncertain and depend upon too many contingencies to safely be accepted as any evidence of the usable value of the property upon which the business is carried on.

Profits depend upon the times, the amount of capital invested, the social, religious and financial position in the community of the one carrying it on, and many other elements which might be suggested. What one man might do at a profit another might only do at a loss. That the plaintiff had made profits in his business in the past was no indication that he would continue to make them in the future, even had the viaduct not been constructed. This testimony being inadmissible, the defendant's objections thereto should have been sustained. *Matter of Gilroy*, 26 App. Div., 314; *Masterton v. Mt. Vernon*, 53 N. Y., 391; *Newton v. Armstrong*, 19 N. Y. Supp., 573; *Edmands v. Boston*, 108 Mass., 535; *Cobb v. Boston*, 109 Mass., 438; *Becker v. Phila. & Reading Terminal R. R.*, 177 Pa., 252.

In the *Matter of Gilroy* (supra), the Court said: "On the hearing before the commissioners the appellant sought to prove the profits they made in their business during a term of years. This testimony was rejected, we think, properly. It is doubtless competent for the land owner to prove the value of the land taken from him for any purpose for which

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it may properly be used, and he is entitled to that value, even though he may put the property to a different use. It was, of course, competent to show that the property was used for business purposes and was suitable for such purposes, for, as a rule, business property demands a higher price than property used merely for the purpose of residence. It was also competent to show the general character of the business, for property desirable or available for business of a certain character might command higher prices than property only suitable for business of another character, but the profits the occupants had realized from the business carried on upon the property does not tend to show the value of the property itself. * * * The profits of the business would naturally depend far more largely upon the judgment, forethought and business skill of the appellants, and the use of their capital and the condition of trade, than upon the value or location of the particular property upon which the business was conducted."

But it is unnecessary to further consider the subject. The testimony was inadmissible, and could not be used for the purpose intended. It was just the kind of evidence to injure the defendant by taking the minds of the jury from the real fact to be ascertained, namely, the damages to the usable value, and that it did injure the defendant is evidenced by the verdict itself.

It follows that for the error thus committed the judgment must be reversed and a new trial granted, with costs to the appellant to abide the event.

All concur.

Amendment — When denied.—After four years of successful defense to an equitable action, the plaintiff will not be permitted

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to amend the complaint so as to set up new and distinct causes of action at law. *Higgins, as Receiver, v. Gedny*, 28 Civ. Proc. Rep., 236; *Maltby-Henley Co., v. Deane*, 28 Civ. Proc., Rep., 338.

When allowed.—Permitted to conform to proof. *Martin v. Home Bank*, 28 Civ. Proc. Rep., 71.

PETER G. ARNOT, RESPONDENT, v. JAMES
NEVINS ET AL., APPELLANTS.

SUPREME COURT, APPELLATE DIVISION, FIRST
DEPARTMENT.

§§ 970, 974.

Counterclaims in equitable actions.

Motion for jury trial to be made within ten days after issue joined.

(Decided November, 1899.)

Appeal from an order denying motion made by the appellants that certain issues in an action be tried by a jury.

Louis H. Levin, for appellants.

J. Woolsey Shepard, for respondent.

INGRAHAM, J.—The action was brought to foreclose a mechanic's lien. The plaintiff was a subcontractor and agreed to furnish to the contractors, for the erection of two buildings in the city of New York, certain cut stone required for the buildings, and to set the same. The appellants, who were the principal contractors, set up in their answer several counterclaims, whereby they sought to recover from the plaintiff upon promissory notes alleged to have been made by him and held by the appellants, and the damages claimed to have been sustained by rea-

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son of the failure of the plaintiff to carry out his contract with the appellants, amounting to the sum of \$160; and upon the counterclaims the appellants demanded an affirmative judgment against the plaintiff. The plaintiff, by his reply, put in issue the allegations constituting the counterclaims. The reply was served on the 23d day of January, 1889. The plaintiff then noticed the action for trial at Special Term, and the case was placed upon the calendar. Subsequently, and on the 1st of March, 1889, the appellants made a motion that certain issues of fact specified in the motion papers be sent to a jury for trial. These issues included those raised by the answer and by the reply to the counterclaims. The motion was denied by the Court below on the ground that it was made too late and that no good reason appeared for requiring two trials of the action.

The action being an equitable one, the parties did not have the right to a jury trial at common law. Whatever right the defendants had to have the issues tried by a jury was conferred by section 974 of the Code of Civil Procedure; and in such a case an application must be made to the Court upon notice for an order directing that the question specified be stated for trial within section 970 of the Code of Civil Procedure. *Mackeller v. Rogers*, 109 N. Y., 472; *Smith v. Fleischman*, 23 App. Div., 359.

Rule 31 of the General Rules of Practice provides that "in cases where the trial of issues of fact is not provided for by the Code, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings, that the whole issue, or any specific questions of fact involved therein, be

tried by a jury." It would seem that this rule applied. The trial of the issues of fact in this action is not provided for in the Code. Provision is therein made for application to the Court upon notice that the issues of fact arising out of the counterclaim may be tried by a jury where such a trial would be allowed in a cause of action brought by the defendant against the plaintiff for a cause of action stated in the counterclaim; but to claim such a trial where such a counterclaim is interposed in an equitable action the motion must be made under section 970 of the Code, and such a motion under Rule 31 must be made within ten days after issue is joined. By not making the motion within ten days the appellants lost the right to have the issues sent to a jury for trial. It is true that the Court in its discretion might have ordered such a trial, if it was considered necessary; but the appellants by their failure to move within the time specified lost the right to move and were not aggrieved by the denial of their motion.

An examination of the pleadings would indicate that a trial by jury would serve no good purpose, but would cause additional expense and delay. The question as to whether or not the plaintiff executed these promissory notes does not require a jury trial, and the counterclaim to recover damages for the failure of the plaintiff to perform his contract as involved in the issues raised by the answer involved the right of the plaintiff to recover at all, and that question must be disposed of on the trial at Special Term.

It follows, therefore, that the order appealed from was right and should be affirmed, with \$10 costs and disbursements.

All concur.

Finn v. Mehrbach.

MORRIS FINN v. JEANETTE MEHRBACH.
(Three actions.)

MUNICIPAL COURT OF THE CITY OF NEW YORK,
BOROUGH OF MANHATTAN, SEVENTH DISTRICT,
MARCH, 1900.

§§ 729, 730, 3347, subd. 6.

Municipal Courts — Attachments — Power of Justices to permit amendments of undertakings — Concealment, with intent to avoid service of summons — Claim by third party to property attached.

The Justices of the Municipal Court of the city of New York have power to grant amendments of defective undertakings on attachment. Held, that a proper exercise of discretion, under the circumstances disclosed, required the amendment of undertakings on attachment filed in the cases at bar.

Removal or concealment of a defendant with intent to avoid the service of a summons is ground for an attachment, and it is not necessary to show that the concealment was for the purpose of avoiding "the" summons in the action in which the attachment is obtained. If it be made to appear that defendant has removed or is concealing himself with intent to avoid the service of a summons, that is all the law requires.

Held, that the appearance of a third party claiming the property attached and the production by him of an undertaking conditioned that "if in an action upon the bond, to be commenced within three months hereafter, the claimant will establish that he was the general owner of the property so claimed by him at the time of said seizure, or if he fails so to do, that they will pay to the plaintiff the value thereof, with interest, etc.," are not sufficient to stay the proceedings until the determination of the title to the property attached.

(Decided March, 1900.)

Leon Lewin, for plaintiff.

Purdy & Bishop (Adolphus D. Pape, of counsel), for defendant.

JOSEPH, J.— The questions which are presented for determination in these three actions arise under the following facts and circumstances:

On January 20, 1900, a summons was issued out of this Court in each of the actions, and accompanying the same was a warrant of attachment issued by the Clerk of the Court, pursuant to the allowance thereof by the Justice, as required by the statute.

The ground upon which the attachment was issued, as stated therein, was "that the defendant, Jeanette Mehrbach, keeps herself concealed with the intent to avoid the service of the summons." The warrants were issued upon the facts set forth in sworn complaints, the statements of which will be referred to hereafter.

At the time of applying for the warrants the plaintiff presented to the Justice undertakings in each action, in the sum of \$250 each, conditioned "that if the defendant recover judgment herein, or if the warrant of attachment is vacated, the plaintiff above named will pay all costs which may be awarded to the said defendant, and all damages which the said defendant may sustain by reason of the attachment, not exceeding the sum of \$250."

The undertakings were approved of by the Justice. In due time a return was made by the marshal to whom the warrants of attachment were issued that he had attached and taken into his possession eighteen oil paintings, of unknown value to him, and also cash in bank amounting to \$26.05; also a return of the service of the summons upon Isidore Mehrbach, a person of suitable age, at the residence of the defendant, being unable to serve the defendant personally.

On the return day of the summons an attorney

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appeared in this Court on behalf of Isidore Mehrbach and presented to the Justice an undertaking reciting the seizure of the property under the attachment and that Isidore Mehrbach claimed the chattels so attached, excepting the cash in bank, and conditioned "that if in an action upon the bond, to be commenced within three months hereafter, the claimant will establish that he was the general owner of the property so claimed by him at the time of said seizure, or if he fails so to do, that they will pay to the plaintiff the value thereof, with interest, etc."

Affidavits on behalf of defendant were also presented, denying that she was keeping herself concealed with intent to avoid the service of the summons in this or any other action.

The appearance on behalf of defendant was solely for the purpose of moving to vacate the attachment. The right to have the attachment vacated was based upon the following grounds:

I. That, as the attachment was granted at the time of the issuance of the summons, it could not be truthfully stated that the defendant was keeping herself concealed for the purpose of avoiding the service thereof.

II. That, as the defendant has not been personally served with the summons in the action, and there is a third-party claim to the property, the title thereto must be first determined before the case can proceed, in order that the Court acquire jurisdiction.

III. That the grounds upon which the attachment was issued were, therefore, insufficient in law.

IV. That the undertaking was not in its provisions in compliance with the statutes, and, hence, it failed to give jurisdiction to the Justice to authorize the issuance of the warrants.

An examination of the statutes at once discloses that the undertaking does not comply with its provisions, but plaintiff has moved to amend the undertaking, so as to make it comply with the requirements of the law, and has offered an amended undertaking, correct in form, with the request of the sureties that it be so amended.

The defendant insists the Justice has no power to allow the amendment, and this raises the interesting question as to the powers of the Justices of the Municipal Courts to permit an amendment of undertakings given on provisional remedies.

The complaint sets forth all the jurisdictional facts, and a complete cause of action to recover a sum of money only on contract.

It will be well to consider the last question first, that is, the power of Municipal Courts to permit amendments of undertakings on attachment, for, unless an amendment to the undertakings in these actions is had, the attachments cannot be sustained, for I take it as an undisputable proposition that the defendant is entitled to an undertaking in conformity with the provisions of the statutes.

Section 3347 of the Code of Civil Procedure, subdivision 6, provides that sections 729 and 730 of the Code apply "to proceedings taken in any Court, or before any officer or body."

Section 729 of the Code reads as follows: "A bond or undertaking required by statute to be given by a person to entitle him to a right or privilege, or to take a proceeding, is sufficient if it conforms substantially to the form therefor prescribed by the statute, and does not vary therefrom to the prejudice of the rights of the party to whom or for whose benefit it is given."

Section 730 reads: "Where such bond or under-

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taking is defective, the Court officer or body that would be authorized to receive it or to entertain a proceeding in consequence thereof, if it was perfect, may, on the application of the persons who executed it, amend it accordingly, and it shall thereupon be valid from the time of its execution."

These sections of the Code were passed in 1876, re-enacted 2 R. S., 556, sections 33 and 34, adding the words: "Or undertaking."

These provisions have been held to authorize amendments to undertakings on attachment. *Kissam v. Marshall*, 10 Abb., 424; *Bondy v. Collier*, 11 Misc., 443.

The office of an undertaking is not to confer jurisdiction, but to secure to the defendant security in case the person suing out the writ does so without right. *Simmons Hardware Co. v. Alturas Com. Co.*, 39 Pac. Rep., 550.

That sections 729 and 730 apply to undertakings given to procure provisional remedies is settled by *Dale v. Gilbert* (128 N. Y., 625), wherein the Court of Appeals reversed the decisions of the Special and General Terms of the Supreme Court, denying a motion to amend an undertaking given in replevin, on the ground of want of power.

Peckham, J., in that case, speaking for the Court, says: "We think the Court has the power to permit such amendment, the same as it has power to permit a correction of any other alleged error which the party states that he has inadvertently made. Whether it should be allowed or not depends upon the question whether the party in whose favor the error may have been made can be placed in the same position substantially which he occupied previous to its commission * * * When an application to

substitute an undertaking, or, in other words, to amend is made, it should be presented to the Court, and it will be for the Court to say whether, in view of all the facts, it should be granted."

I conclude, therefore, that the Justices of the Municipal Courts have full power to permit amendments to defective undertakings under the sections above cited.

The cases cited by the counsel for the defendant in his able brief have no application to the case at bar, as they were all decided before the amendment to the Revised Statutes, which permitted of amendments to undertakings, by including them in the sections of the Code above cited.

I am also of the opinion that the proper exercise of my discretion requires me to permit the amendment in this action. By the amendment defendant secures the full indemnity she was entitled to in case the plaintiff is not entitled to his attachment, and she has lost and loses no rights for permitting the amendment undertaking to be filed. Indeed, she is put in a better position, for no question can arise as to her right to sue the surety, if she should ultimately succeed in the action. *Mittnacht v. Kellerman*, 105 N. Y., 467.

The next question for consideration is whether the ground upon which the attachments were procured permits of an attachment, to wit, that defendant keeps herself concealed with intent to avoid the service of the summons.

Counsel for defendant contends that, as the attachment was issued to accompany the summons, there could be no concealment with intent to avoid its service, and he further contends that it is insufficient to sustain an attachment to show that a person con-

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ceals himself to avoid the service of a summons, without going further and alleging the additional intent to cheat and defraud creditors.

The grounds upon which an attachment may issue out of Municipal Courts are regulated by section 1317 of the Consolidation Act, the provisions of which, so far as is here material, are:

“If the defendant is a natural person and a resident of the State that he has departed or is about to depart from the county where he last resided with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent.”

It is perfectly plain from the reading of this provision that an attachment may issue where the defendant has departed or is about to depart from the county where he last resided, with intent to defraud his creditors, or where he has departed or is about to depart from the county where he last resided, with intent to avoid the service of a summons, and, also, in case he conceals himself within the county with intent to defraud his creditors, or conceals himself in the county, with intent to avoid the service of a summons.

I see no force in the suggestion that it must be alleged that the intent to avoid the service of the summons is with the intent to defraud the creditors. The removal or concealment with intent to defraud creditors is a ground for the attachment alone. It is not necessary that the attempt to avoid the service of a summons should be coupled with the intent to defraud creditors in order to justify an attachment.

What reason is there, therefore, to hold that this intent to defraud creditors, which of itself is grounds for an attachment, should be required to be added to

the other ground, to wit, the intent to avoid the service of a summons. In fact, the necessary result of an intent to avoid the service of a summons by removal or concealment is to delay and defeat creditors in the enforcement of their claims, which is a fraud upon them.

In *Easton v. Malavazi* (7 Daly, 147), an attachment issued on the ground that defendant kept himself concealed in the city, with the intent to avoid the service of the summons, was upheld. See, also, *Hall v. Anderson*, 17 Misc., 270; *Read v. Wollmer*, 53 Hun, 615.

I, therefore, hold that a removal or concealment, with intent to avoid the service of a summons, is a ground for an attachment. Nor do I think it is necessary that it must be shown that the concealment must be for the purpose of avoiding service of "the" summons in the action in which the attachment is obtained. The language of the statute is that the attachment may issue where it is shown that the defendant has removed from the country or has concealed himself within the county, with the intent to avoid the service of "a" summons, that is, any summons. If it is made to appear that defendant has removed or is concealing himself, with the intent to avoid the service of a summons, that is all the law requires. It does not require that an attempt to serve the summons shall be made if the defendant has removed from the county, with the intent to avoid service. It would be useless to attempt to serve it, and even if he keeps himself concealed within the county, with like intent, it would almost be a work of supererogation to attempt to serve it in the first instance, for the reason that if the attempt to serve were successful, it would almost negative

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the claim that the defendant concealed himself. Moreover, the Legislature provided that an attachment must accompany the summons (§ 1318 of the Consolidation Act). Therefore, it is impossible that an effort to serve the summons must first be made. In providing that an attachment may issue upon the ground that a person has concealed himself, with intent to avoid the service of a summons, and that an attachment must accompany the summons, the Legislature has precluded me from construing these provisions, as defendant's counsel would have me. Such construction would nullify the statutes, and it is the duty of the Courts to construe statutes, if possible, so as to harmonize and make effective all their parts. This can only be done by construing these statutes in the way I have above indicated.

As a matter of fact, it appears by the affidavits upon which these attachments were issued that the plaintiff endeavored to serve defendant with summonses in three prior actions brought by him to recover an indebtedness sued for by him, and that from the 13th day of September, 1899, to just before the commencement of these actions, he has been endeavoring to serve defendant with the summons. No less than eight aliases were obtained in each of these actions, and efforts were made to serve defendant by five different individuals.

I am perfectly satisfied that an honest and diligent effort to serve defendant with summons has been made, and that defendant knew it was desired to serve her, and that she refused to allow herself to be served. I, therefore, deem the attachments to have been properly issued, and for sufficient cause.

The next question to be considered is what is the effect upon the proceedings on the third-party claim

to some of the property attached? Does it stay the proceedings until the determination of the title to the property attached? The property attached is attached as the property of the defendant. If it is not the property of the defendant, the person whose property it is has a right of action against the marshal attaching it, and possibly against the person at whose instance it was attached.

The claimant is not seeking this remedy, but is seeking to possess himself of the property by virtue of the provisions of section 1323 of the Consolidation Act. To that end he has offered an undertaking. The sufficiency of the same is not now under consideration, only its effect. Assuming it to be sufficient, it simply accords to him the right to the possession of the property pending the determination of his title thereto in an action to be brought on the undertaking. This is the extent of his right and privilege. The question of title is not to be determined in this action, nor is there any provision to be found within the statutes staying the further proceedings in the action in which the attachment is issued until the determination of the question of title.

The effect of the provisions of section 1323 is to substitute the undertaking in the place of the property attached, and the action continues the same as if the property were retained by the marshal. The idea that because defendant has been brought into Court by substituted service of the summons, and not by personal service, makes the action an action in rem and not in personam, is, in my opinion, erroneous. The action is in no sense an action in rem. An attachment is not an original process, but is a mere proceeding in an action. Its office is not to

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give the Court jurisdiction, but to obtain possession of and hold the debtor's property until the recovery of judgment (*Stone v. Pratt*, 90 Hun, 391).

The defendant is a resident of this State, and the Courts of this State may acquire jurisdiction over her person by the service of its process in any manner authorized by the statutes of this State. It does not necessarily have to be by actual personal service. It may be by substituted service. 22 Am. & Eng. Ency. of Law, 1st ed., p. 148.

The Legislature has, by section 1321 of the Consolidation Act, provided for substituted service on defendant, in actions in the Municipal Courts, wherein an attachment has been levied on property and defendant has not appeared and the summons has not been served upon him personally.

Where substituted service is made, the Justice shall proceed to hear and determine the action, and judgment rendered in the action is *prima facie* evidence on the part of the defendant in any subsequent action brought against her upon the judgment. The judgment, therefore, merges the cause of action. Section 1329 of the Consolidation Act.

I, therefore, conclude that the defendant is properly before the Court, and that, unless the defendant answers to the complaint, I will proceed to hear and determine the action.

Estoppel.—The obligors upon a bond or undertaking are estopped from questioning the validity of the same, after it has been presented and acted upon. *Lyman v. Brucker*, 56 N. Y. Supp., 767.

Amending defects.—An undertaking on appeal may be amended (*O'Sullivan v. Connors*, 22 Hun, 137), and a new one may be allowed to be filed *nunc pro tunc*. *Mills v. Thursby*, 11 How., 129.

The same in attachment (*Milbank v. Broadway Bk.*, 3 Abb. N. S., 223). On injunction (*Leffingwell v. Chase*, 5 Bosw., 703).

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In partition, if guardian ad litem (Croghan v. Livingston, 17 N. Y., 218). On arrest. Bellinger v. Gardner, 2 Abb., 441.

Irregularity.—Where a seal is omitted, it is an irregularity which does not affect the jurisdiction of the Court, nor the liability of the sureties, nor are the rights of the parties prejudiced thereby. Such irregularity can be corrected, on motion by either part. Hyatt v. Dusenbury, 5 State Rep., 846.

ST. GEORGE VINEYARD COMPANY, RESPOND-
ENT, v. HENRY FRITZ, IMPEADED, APPELLANT.

SUPREME COURT, APPELLATE DIVISION, FIRST
DEPARTMENT, FEBRUARY, 1900.

Liability of director for failure to file annual report — Construction of section 34, Stock Corporation Law (chap. 354, Laws 1899).

The books of a corporation, while not competent evidence against a stranger or as against a director in an action in which the company itself seeks to enforce a liability against him, arising out of some dealing by him with it as an individual, are competent to establish that a certain person is a director, and, if it be necessary, that he is a stockholder.

It having been shown that defendant was elected a director, and, by independent evidence, that he accepted the position and took part in the business of the corporation, he cannot, in order to avoid liability arising out of failure to file an annual report, claim that he was not eligible as a director.

Section 34 of the Stock Corporation Law (chap. 354, Laws 1899), exempting a director from liability to a creditor of a corporation because of failure to file an annual report, unless a written notice is served upon the director by the creditor, as prescribed by such section, does not apply to causes of action which were in suit, and as to which a complaint had been served, at the time said section 34 took effect.

(Decided February, 1900.)

Appeal from judgment entered on verdict, and from order denying motion for new trial.

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Malcolm R. Lawrence, for appellant.

George E. Morgan, for respondent.

PATTERSON, J.—The plaintiff, alleging that the defendant, Fritz, was, in the year 1897, a director of the California Vintage Company, a corporation of the State of New York, brought this action to enforce the liability created by section 30 of the Stock Corporation Law, for the failure to file an annual report of that corporation during the month of January, 1897, as required by that section. The plaintiff was a creditor of the corporation. The complaint, after alleging the indebtedness and that the defendant, Fritz, was a director of the corporation, sets forth the failure to make and file the report, as required by law, and that the defendant did not file, within thirty days after the 1st of February, or at any other time, the certificate mentioned in the thirtieth section as being necessary to exempt a director from liability. The defendant, Fritz, in his answer, denied all the substantial averments of the complaint. On the trial the indebtedness was fully established, and the default in filing the report and the certificate referred to was fully proven. The issue of fact was litigated, as to the defendant, Fritz, actually being a stockholder and director of the company, and he further claimed that by reason of an amendment (ch. 354, Laws of 1899) to the Stock Corporation Law, he was exempted from liability because the plaintiff did not serve upon him a written notice required by section 34 of the Stock Corporation Law, which is a section added to that law and constitutes the amendment referred to. The plaintiff had a verdict, and from the judgment entered thereon and from an order

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denying a motion for a new trial, the defendant, Fritz, appeals.

It is urged on his behalf that there was no competent proof to show that he was a director of the California Vintage Company at the time the indebtedness to the plaintiff accrued. That indebtedness arose on promissory notes, dated and maturing in the year 1897. The plaintiff showed by the only stock book the company had or used that a certificate of stock had been issued to Fritz. The certificate itself was not produced, but an entry on the stub of the certificate book showed that one had been issued. The directorship was proven by the record of the company, contained in the minute book of the proceedings of its board of directors, and in connection with that evidence the president of the company testified that Fritz was present at meetings of the directors and participated therein, taking an active part in the business transacted at such meetings. From this minute book it was shown that the defendant, Fritz, was elected a director of the corporation in the year 1892, and by the by-laws of the company, read in evidence, it appeared that directors were to hold office for a year or until their successors were elected. Subsequent to 1892 no election for directors was held. If the defendant, Fritz, became a director in 1892, he continued to be and was such, with the duties and responsibilities attached to the position, when the indebtedness to the plaintiff was incurred. That results, not only from the by-law, but from the provisions of statutes relating to the subject, as is pointed out in *Tyson v. Fritz* (44 App. Div., 562), which was an action against this same defendant as a director of this same corporation. But the competency of the evidence by which Mr. Fritz's relation

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to the company, as a director, was established, is challenged. In the main, that evidence is from the books of the company. While those books would not have been competent evidence against a stranger or as against Mr. Fritz in an action in which the company itself sought to enforce a liability against him arising out of some dealing by him with it as an individual, they were competent to establish that the defendant, Fritz, was a director, and, if it were necessary, that he was a stockholder. The books of a corporation "are received in evidence generally to prove acts of a corporation, such as its incorporation, its lists of stockholders, its by-laws, the formal proceedings of its board of directors, and its financial condition when its solvency comes in question" (*Rudd v. Robinson*, 126 N. Y., 118). The records of this corporation show that the defendant was a stockholder, and also that he was elected a director, and that he acted as a director; in addition to which there is independent proof that he did act as a director. Having been elected a director, and it being shown by independent evidence that he accepted the position and took part in the business and affairs of the corporation, he cannot, in order to avoid liability arising out of the failure to file an annual report, claim that he was not eligible as a director. This does not result from an estoppel, but "as a consequence of the rule that one who enters upon the office, and exercises its functions, is responsible for his acts to the same extent as though he of right occupied the position." *Donnelly v. Pancoast*, 15 App. Div., 323.

It was claimed at the trial that the plaintiff, a foreign corporation, had not filed the certificate required by law to enable it to do business within

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this State. Upon that point it is sufficient to say that it is not raised by the pleadings.

The defendant, Fritz, is, therefore, liable, unless that liability has been extinguished by the provisions of the new section (34) added to the Stock Corporation Law by the amendment of 1899. It is provided by subdivision 2 of that section that no director or officer shall be liable to any creditor of the corporation, "because of any failure to make or file an annual report, whether heretofore or hereafter accruing, unless within three years after the occurrence of the act or the default in respect of which it shall be sought to charge the director * * * such creditor shall have served upon such director * * * written notice of his intention to hold him personally liable for his claim, provided, nevertheless, that any such liability because of any such default now existing * * * may be enforced by action begun at any time within the year 1899, or by action begun thereafter, if within such year written notice of intention to enforce such liability shall have been given as above provided."

As said before, the protection of this amendment is not claimed by the defendant in his pleading. The plaintiff's contention is that that should have been done, it insisting that the requirement of section 34 is a proviso only, and not an exception, and invoking the rule that the plaintiff is not bound to anticipate by negative allegations a proviso, but may leave that to his adversary (*Rowell v. Janvrin*, 151 N. Y., 67). In the view we take of the effect of this amendment, it is unnecessary to consider whether what is enacted as to notice by the thirty-fourth section constitutes an exception or a proviso. It seems to require the service of a written notice as a condi-

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tion precedent to liability, and, if that is so, the performance of the condition precedent would be a part of the cause of action. But we do not pass upon that point, as we think the proper construction of the statute is such as to render it unnecessary to determine a question of pleading in this case. The amendment does, in express words, refer to cases in which there has been a failure to file a report, either before or after its enactment, but there is nothing in its terms or by necessary implication therefrom to authorize the construction that its retroactive operation shall be such as to destroy causes of action already put in suit, and in which the parties are awaiting the judgment of the Court. This action was begun and was at issue nearly two years before the amendment to the statute was passed. The right to bring and maintain it was complete when it was brought. The amendment introduced by the thirty-fourth section does not destroy the cause of action. Full effect can be given to its retroactive provision by construing the word "heretofore" as applying to defaults which occurred before the passage of the amendment, but as to which rights have not become fixed, and upon which actions have not been brought to enforce such rights. It is true that the liability of a director is penal in its character, and that the amendment affects the right thereafter to sue the director upon that liability. It makes the service of a notice necessary, but it is not to be inferred from that that it was the intention of the Legislature to abate and destroy actions pending and ripe for trial. Liability is not extinguished, nor the penal provision of the thirtieth section repealed. We have had occasion to consider the effect of legislation depriving creditors of insolvent banking cor-

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porations of their right to enforce the statutory liability of stockholders under the fifty-seventh section of the Banking Law of 1892. By chapter 441 of the Laws of 1897, that section was amended so as to provide that wherever such corporation was dissolved by final order of the Court having jurisdiction, and a permanent receiver or receivers shall have been appointed, all actions or proceedings to enforce the liability of stockholders should be begun and prosecuted only in the name and in behalf of such receiver or receivers, unless they have refused to take any action, upon proper request. In *Mahoney v. Bernhard*, which was a creditor's suit against a stockholder (decided at the November term of this Court, 1899), it was held that the contention that that amendment applied to an action actually pending when it was passed was untenable, and that the retrospective language used in the amendment did not affect such pending action. We think the same construction should be given to the amendment of 1899, of the Stock Corporation Law, although it may affect a right, while the other statute affected only a remedy, and that the Legislature, in amending the Stock Corporation Law, intended nothing else. In pending actions a written notice of the election of the creditor to hold the director liable had already been given in the summons and complaint. The amendment does not require any particular form of written notice, and it would be an unreasonable construction to hold that an action in which the issue was framed is to be made to abate by the terms of a statute subsequently passed, which does not repeal the law creating the liability, and that a plaintiff regularly in Court at the time the amendment was enacted must abandon his action, be subjected to the pay-

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ment of costs of that action, serve a written notice of an intention to do what he has already given notice of in writing, and then bring another suit upon the same cause of action within a time limited by the amendment. If the construction contended for by the appellant is correct, then a suitor who obtained judgment prior to the passage of the amendment, and from which an appeal had been taken and was pending during the year 1899, but not determined until that year expired, and then reversed by the Court of last resort, because of some technical defect of proof or some erroneous ruling on evidence, would on a new trial, be subjected to the dismissal of his complaint, with costs of all the prior proceedings, and be unable to bring a new action, for he could not comply with the requirement of the amendment. There must have been some legislative purpose or intent in passing this amendment of 1899. We are unable to perceive that there could have been any other legitimate object than to give an opportunity to a director to make payment or settlement of a claim against him, and thus save himself the costs of an action, or put himself in a position by paying the debt to be subrogated to the rights of the creditor or enforce contribution from his co-directors. Subrogation and contribution do not depend on the notice to be given by the creditor, but upon the payment of the creditor's claim. To that end it is not essential that existing actions should be discontinued. It is not required to effectuate all that it was intended to accomplish by the provision that it shall be held to apply to causes of action already in suit to which the defendant has pleaded, and in which a written notice has been given by the complaint. Full effect

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can be given at the retrospective requirement of the amendment without resorting to such a construction or imputing to the Legislature such an extraordinary intent. If the whole liability had been repealed, a different question would arise, but the case is not to be treated as one in which a penal statute has been repealed. There still exists a law under which, after trial, judgment would be authorized. The liability still exists, but is only regulated by the thirty-fourth section, and before that can be held to apply to existing actions it should be plain that no other construction can be given reasonably to the amendment than that such actions were to abate.

The judgment and order appealed from must be affirmed, with costs.

All concur.

IN THE MATTER OF THE ESTATE OF EDMUND G. THURBER, AN INCOMPETENT PERSON; AMERICAN SURETY COMPANY OF NEW YORK, PETITIONER, APPELLANT; FANNIE C. THURBER, COMMITTEE, RESPONDENT.

COURT OF APPEALS, MARCH, 1900.

§ 812.

Surety company — Right to be relieved and compel its principal to account.

A surety company has the same right as an individual bondsman to petition the Court to be relieved from liability for the future acts or default of its principal, and to require its principal to file a new bond and settle his account. Code Civ. Proc., § 812.

(Decided March, 1900.)

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Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, affirming an order made by the Court at Special Term.

Edwin Countryman, for appellant.

Raymond C. Haff, for respondent.

VANN, J.— This proceeding was commenced by an application made by the American Surety Company of New York, under section 812 of the Code of Civil Procedure, to be released as surety upon the bond of Fannie C. Thurber, the committee of Edmund G. Thurber, an incompetent person.

In October, 1897, Edmund G. Thurber was adjudged a lunatic, and Fannie C. Thurber was appointed his committee upon giving a bond in the usual form in the penalty of \$50,000. The bond was given on the 20th of August, 1898, the American Surety Company signing the same as surety in consideration of \$50, paid down by Mrs. Thurber, and the agreement to pay \$25 a year annually thereafter while the bond was in force. Before signing the bond the Surety Company accepted a contract from Mrs. Thurber, whereby she agreed, among other things, to hold the company harmless, notify it of suits and deposit any moneys coming into her hands in an accredited trust company, the same to be withdrawn only upon checks signed by her, as committee, and countersigned by the Surety Company or its representative. It was also provided that "this agreement shall not, nor shall acceptance by the surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time of other security, in any way abridge, defer or limit its right

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to be subrogated to any right or remedy, or limit or abridge any right or remedy which the surety otherwise might or may have, acquire, exercise or enforce."

In February, 1899, while the bond was still in force, an order was granted upon the petition of the company, requiring Mrs. Thurber to show cause why she should not furnish new sureties and render an account, as committee, or be removed from that position. She tried to show cause by presenting an affidavit establishing perfect regularity of procedure on her part, as committee, and alleging that the company was acting through ulterior motives, induced by the lunatic's relatives, who had refused to recognize her as his wife or their child as his legitimate son. She charged that their object was to prevent her from prosecuting certain actions to set aside contracts made by the lunatic, in which one of their number was interested. She made out a strong case of hardship and injustice, which would have authorized the Court, if its power is discretionary, to exercise its discretion by denying the motion. The Special Term denied the application upon the ground that section 812 of the Code was not intended to apply to the case of a surety for consideration, as distinguished from a gratuitous surety. Among the recitals of the order, as finally entered, is the statement that the company, on the argument of the motion, offered to return to Mrs. Thurber the premium paid by her.

The Appellate Division stated in its order of affirmation that it was "made upon the ground that the provisions of section 812 of the Code of Civil Procedure, providing for the release or discharge of sureties from further liability, or liability for a subse-

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quent act or default of the principal, do not apply to this case, the surety here being a corporation organized for surety purposes, and having become surety herein for compensation, and pursuant to a contract appearing on the record."

As it appears in the order appealed from that the determination of the Appellate Division was based on a want of power to grant the application, a question of law is presented, which it is our duty to review, even if the Courts below might have denied the application in the exercise of discretion (*Tolman v. S. B. & N. Y. R. R.*, 92 N. Y., 354). The order states, in effect, that the Court simply decided the question of power without considering the question of discretion.

The power of the Court depends on the construction of section 812 of the Code of Civil Procedure, which occurs in an article entitled "General Regulations respecting Bonds and Undertakings." It is provided by section 810, which is the beginning of the article, that a bond or undertaking given in an action or special proceeding must be acknowledged or proved and certified in like manner as a deed to be recorded. Section 811 provides, among other things, that "the execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this State to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties, and such company, if excepted to, shall justify, through its officers or attorney, in the manner required by law of fidelity and surety companies." Section 812 requires the bond to be joint and several in form where two or more persons execute it, and "except when executed by a fidelity or surety company, or when otherwise expressly pre-

scribed by law, it must be accompanied with the affidavit of each surety " as to his qualifications. After making other regulations relating to the subject, the section further provides that " the surety or sureties, or the representatives of any surety or sureties upon the bond of any trustee, committee * * * or other fiduciary may present a petition to the Court or Judge that accepted such bond, praying to be relieved from further liability, as such surety or sureties for the act or omission of the principal named in such bond occurring after the date of the order relieving such surety or sureties hereinafter provided for, and that such principal be required to show cause why he should not account and give new sureties. Thereupon, the Court or Judge must issue an order to show cause accordingly and may restrain such principal from acting, except to preserve the trust funds until further order. Upon the return of the order so issued, if the principal in the bond file a new bond in the usual form to the satisfaction of the Court or Judge within such reasonable time, not exceeding five days, as the Court or Judge fixes, the Court or Judge must make a decree or order requiring the principal to account for all his acts and proceedings to and including the date of such order and to file such account within a time fixed, not exceeding twenty days, and releasing the surety or sureties petitioning from liability upon the bond for any subsequent act or default of the principal. If the principal fails so to file such bond within the time specified, a decree must be made revoking the appointment of such principal and requiring him to so account, and file such account within twenty days. After the filing of an account, as required in this section, the Court or Judge must, upon the petition

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of the surety or sureties, or the representatives of such surety or sureties, issue an order requiring all persons interested in the estate or trust funds to attend a settlement of such account at a time and place therein specified, and, upon the trust fund or estate being found or made good and paid over or properly secured, the surety or sureties shall be discharged from any and all further liability upon such bond."

The argument in support of the position taken by the Courts below is that, while the general words "surety or sureties" are broad enough to embrace surety companies, as the Legislature, when referring to such a company elsewhere in the section or the one preceding, named it in terms, and did not so name it in the provisions authorizing the Court to relieve a surety from further liability, it is presumed that there was no intention to give such a surety the right to apply for such relief.

That part of the Code of Civil Procedure which went into effect on the 1st of September, 1877, embraced sections 811 and 812, which then contained no authority to surety companies to sign bonds or undertakings, and no provision authorizing any surety to apply for the relief now authorized by the latter section (L. 1877, ch. 318). In 1881 an act was passed authorizing the acceptance of certain corporations as sureties upon bonds and undertakings required or allowed by law, and in 1893 another act was passed of the same character with more elaborate provisions (L. 1881, ch. 486; L. 1893, ch. 720). In 1886 section 811 of the Code was so amended as to authorize the execution of bonds or undertakings by fidelity or surety companies authorized to transact business in this State (L. 1886, ch. 416). In 1892

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section 812 was amended so as to authorize sureties upon certain official bonds to petition for release from liability, and this is the first appearance of any provision upon that subject in the Code which we have been able to discover (L. 1892, ch. 568). In 1895 said section was further amended by inserting in the earlier part thereof the provisions relating to fidelity and surety companies, which now appear therein (L. 1895, ch. 511). At this time surety companies had been doing business throughout the State for a number of years, as the Legislature, from its own action, is presumed to have known. When, therefore, it inserted a general provision relating to fidelity and surety companies in the earlier part of the section, if it had intended to except such companies from the provisions of the latter part, applying to sureties generally, the presumption is it would have said so in terms. It cannot be presumed that when amending the forepart of the section its members failed to read the remainder, or to comprehend the effect of the amendment upon the section as a whole. It allowed the general language, which theretofore had included all sureties authorized to sign bonds given in judicial proceedings, to remain after the section was so extended as to include fidelity and surety companies. As they are expressly named in one part and named generally in another, with no exception or qualification, there is no adequate reason to believe that the Legislature intended to exclude them from any part. There was no necessity for repeating the words "fidelity or surety companies" in order to make the section, as an entirety, apply to them, for they had already been named and were necessarily included, unless expressly excepted. As the Legislature did not make any exception, we

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cannot, for there is no basis for an exception by implication. The section refers to any surety or sureties, and the appellant is a surety. Having contracted as a surety in the manner authorized by the Code, it can avail itself of such remedies as the Code provides for sureties generally.

Surety companies are a convenience to the community, and it is important that they should continue sound and able to respond to their obligations. The Legislature, doubtless, intended to promote their stability by extending the same protection to them that it extends to other sureties. The contracts of such companies are usually based upon an annual premium for a continuing bond. If the premium were not paid after the first year and the company could not avail itself of the privilege of the statute, its responsibility would continue with no compensation, for the bond would still be in force. No company can do business on such a basis. Moreover, if the annual premiums are paid, but the principal is squandering the estate, how can a surety company protect itself? Through its officers it may inform those interested and request action on their part, but if they reply "you are good and we are safe," what relief is there, unless it is under this section? If it cannot induce those ultimately entitled to the money or property to act, its condition is hopeless and bankruptcy may be the result. These considerations, and others of like character, may well have influenced the action of the Legislature when it amended the section under consideration.

The provisions of the statute authorizing the company to become a surety are part of the contract of suretyship, and were not waived by accepting the contract of indemnity, which expressly provides that

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acceptance of security or consideration should not "limit or abridge any right or remedy which the surety otherwise might have." We think, therefore, that the Courts below fell into error when they held that section 812 did not apply to this case, and declined to pass upon any other question.

The appellant claims that the provisions of the section are mandatory, as the word "must" ordinarily excludes discretion. That word, however, is occasionally used in the Code without the imperative meaning which it usually has (*Spears v. Mayor, etc.*, 72 N. Y., 442; *Wallace v. Feely*, 61 How. Pr., 225; affirmed, 88 N. Y., 646). The provision requiring the Court to "issue an order to show cause" implies that cause may be shown. It is more than a substitute for a notice of motion, for it is a specific requirement in a statute creating a special remedy, of which it is a part. There is no reason why the principal should be required to show cause, if no cause can be shown under any circumstances. When all the provisions of the section are read together, we think the Court has a discretion to exercise depending on the facts of the case, and is not commanded to make a decree regardless of those facts. In other words, we construe the expression "a decree must be made" under the circumstances to mean "a decree may be made," and, hence the Special Term had a discretion to exercise in the first instance, and the Appellate Division by way of review. Neither Court, however, exercised its discretion or considered the subject, because both held that section 812 did not apply to a surety company. The application of the company, therefore, has not yet been fully passed upon, so we are compelled to

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reverse the order appealed from and remit the proceeding to the Appellate Division for further action.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and LANDON, JJ., concur.

Order reversed, etc.

PHILIP LIPP, AS ADMINISTRATOR, ETC., RESPONDENT, v. OTIS BROS. & CO., APPELLANT; CHAS. J. GILLIS ET AL., RESPONDENTS.

COURT OF APPEALS, FEBRUARY, 1900.

§§ 1870, 1903, 1904, 2732, subd. 7.

Irrelevant evidence — Error in admitting evidence to arouse sympathy of jury.

Upon the trial of an action for the death of the plaintiff's intestate, it is error for the Trial Court to permit the plaintiff to prove the number and pecuniary condition of his children and grandchildren, none of them being next of kin of the deceased. Where, therefore, such evidence is admitted, under objection, and its apparent purpose and probable effect are to arouse the sympathies of the jury, by calling their attention to the opportunities which the plaintiff would have of making a charitable disposition of moneys not needed for his personal use, the judgment entered upon a verdict in favor of the plaintiff will be reversed.

(Decided February, 1900.)

Appeal from judgment of the Appellate Division, First Department, affirming a judgment entered upon a verdict in favor of the plaintiff,

John M. Scribner, for appellant.

Edward C. James and Abram I. Elkus, for respondents.

PARKER, Ch. J.— We are unable to agree with the prevailing opinion at the Appellate Division in so far as it excuses, if it does not fully justify, the course of the plaintiff in calling as his last witness his own son to tell the jury about the children and grandchildren of the plaintiff, and thus calling attention to the great opportunities that the plaintiff had to make a charitable use of any surplus moneys he might have after satisfying his own personal necessities. The evidence could serve no other purpose than to arouse the sympathies of the jury, for none of the persons described were next of kin of the deceased, nor were they, or their riches or poverty entitled to consideration at the hands of the jury.

George Lipp, who lost his life through the accident, for which Otis Brothers & Company were by the judgment below held responsible, was the son of Philip Lipp, who, as the administrator of the deceased, brings this action to recover the "fair and just compensation for the pecuniary injuries resulting from the decedent's death," to him as the next of kin of the deceased (Code Civ. Proc., § 1904). The damages to be awarded in such an action are "exclusively for the benefit of the decedent's husband or wife and next of kin." Code, § 1903.

George Lipp died leaving no wife or children, but he left a father, this plaintiff, who was his sole next of kin (Code, § 1870 and § 2732, subdiv. 7), and, as such, entitled to the entire amount of the recovery in the action. At an early stage of the trial the plaintiff proved the facts and circumstances which were necessary to aid the jury in determining the extent of the pecuniary injury sustained by the plaintiff through the death of his son. The plaintiff testified that his son, at the time of his death, was thirty years

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of age, in good health, had never been sick since he was a boy and had never been known to stay away from work one day on account of his ill-health; that his trade was stonecutting, which he had followed since he was sixteen years of age, and that every two weeks he would turn over to his father the sum of sixty dollars, of which the father would return to him twelve dollars, being six dollars a week, with which to buy his clothes and pay his incidental expenses, the remaining sum of forty-eight dollars being used by the plaintiff in paying house rent and supporting his family, which included boarding plaintiff's intestate and furnishing him a home. All of this evidence was helpful to the jury in reaching a conclusion as to the extent of the pecuniary injury done to the plaintiff by the death of his son, and had the plaintiff stopped there this judgment might not have been disturbed. But after plaintiff had sworn the last witness, whom he called for the purpose of supporting the allegations of his complaint, he caused John Lipp, a brother of the deceased, to take the witness stand. Not a single fact did he attempt to prove by John which in anywise affected or related to the issues in the case. From the first question to the last, covering nearly three printed pages of the record, the plaintiff's counsel asked of the witness not a question that did not relate to the brothers and sisters and nephews and nieces of the deceased, not one of whom was next of kin of the deceased, who alone were entitled to be taken into consideration by the jury in determining the amount of damages which they should award. While this was being done the learned counsel for the defendant did not sleep upon his rights, but instead protested by proper objections to the attempt of the plaintiff to put be-

fore the jury this irrelevant and immaterial testimony. The first question asked of the witness, after he had testified that he was a son of the plaintiff and a married man, was: "Q. When were you married?" and, after objection had been overruled and the exception noted, the answer came, "I was married ten years ago. Q. Have you a wife and family? A. I have; and a big family, too." Other questions related to sisters, both married and unmarried, the last question eliciting the answer that the unmarried sister was not able to work. Every question was objected to, and the learned counsel for the plaintiff was thus fully apprised of the contentions of the defendant that the plaintiff had no legal right to have the jury consider the misfortunes or the poverty of the brothers and sisters and nephews and nieces of the dead man in determining the amount of compensation which should be awarded to the father for the injuries sustained by the death of his son. But he would not stop; for he well knew how effective that testimony would be in swelling the amount of the damages to be awarded by a jury who would see no reason for leaving out of consideration, when making up their judgment, the necessities of those who were closely allied in blood to the deceased, especially in view of the fact that the Trial Court, against the strenuous protests of defendant's counsel, had ruled that the testimony was proper for the consideration of the jury. That the answers elicited from the witness were irrelevant and immaterial to the issue presented for trial by the pleadings is not open to question, nor should it, we think, be said it was harmless, but instead that it was within the rule often stated in this Court that, "Illegal evidence that would have a tendency to excite the passions, arouse the preju-

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dices, awaken the sympathies or warp or influence the judgment of the jurors in any degree, cannot be considered harmless" (*Hutchins v. Hutchins*, 98 N. Y., 65). Clearly, the testimony we have been considering could not render any service in the case other than to awaken the sympathies and thus influence the judgment of the jurors in the direction of a greater award, nor is it reasonable to assume that any other result was expected from it. A similar question was presented to the United States Supreme Court in *Pennsylvania Co. v. Roy* (102 U. S., 451). In that case a passenger was injured by the falling of a berth in a sleeping-car in which he was at the time riding, and for the injuries sustained he recovered a judgment in the sum of \$10,000. During the trial the plaintiff, against the objection of the defendant, was permitted to give the number of his children and their ages — a son ten years of age and three daughters of the ages, respectively, of fourteen, seventeen and twenty-one. This was held to be error, and the Court, for that error alone, reversed the judgment.

The judgment should be reversed and a new trial granted, with costs to abide the event.

O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ., concur.

Judgment reversed, etc.

Next of kin.—Section 1870 defines the term, "next of kin," as including all those entitled under the provisions of law relating to the distribution of personal property to share in the unbequeathed assets of a decedent after the payment of debts and expenses other than a surviving husband or wife.

Says the Court in *Mundt v. Glokner* (26 App. Div., 123, 124): "It is clear that the person for whose benefit damages may be recovered in such an action is such a person as was the next of kin, where no husband or wife survived the decedent. And that

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question would have to be determined as of the time of the death. It was not intended to be implied from anything that we said that the damage sustained by any person other than one occupying that relation to the deceased could be recovered in such an action. The person or persons who are next of kin of the decedent are ascertained immediately upon the decedent's death."

Other cases defining the meaning of the term, "next of kin." See *Keteltas v. Keteltas*, 72 N. Y., 312; *Murdock v. Ward*, 67 N. Y., 387; *Luce v. Dunham*, 69 N. Y., 36.

Jury.—It is a question for the jury to decide what was the reasonable expectation of pecuniary benefit to the next of kin, etc., by inheritance or otherwise from the continuance in life of the deceased worth in money. If the requirements of the statute in other respects are satisfied, plaintiff is entitled to recover at least nominal damages, and the fact that the result of the deceased surviving the casualty which caused his death was subject to chance, is no reason for holding as a matter of law that plaintiff could not recover any damages at all or only nominal damages. *Thomas v. Utica & Bl. Riv. R. R. Co.*, 6 Civ. Proc., 353.

Damages recoverable may consist of special damages, i. e., of actual, definite loss, and also of prospective general damages. *Houghkirk v. Prest. D. & H. O. Co.*, 92 N. Y., 219.

Amount of damages.—See *Houghkirk v. Del. & Hud. Can. Co.*, 15 Week. Dig., 522; *Burke v. Witherbee*, 18 Week. Dig., 369; *Bierbauer v. N. Y. C. & H. R. R. Co.*, 77 N. Y., 588; *Lehman v. City of Bklyn.*, 29 Barb., 234; *Kelly v. Twenty-third St. R. Co.*, 14 Daly, 418.

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**CHARLES PILKINGTON, RESPONDENT, v. THE
BROOKLYN HEIGHTS RAILROAD, APPEL-
LANT.**

**SUPREME COURT, APPELLATE DIVISION, SECOND DE-
PARTMENT, MARCH, 1900.**

§ 66.

Attorneys' lien — Construction of section 66, Code of Civil Procedure.

In an action for personal injuries the defendant was served, simultaneously with the summons and complaint, with a notice, in pursuance of an agreement between the plaintiff and his attorneys, of a lien of said attorneys upon a verdict, judgment, compromise or settlement to the extent of one-third thereof. Thereafter the plaintiff accepted from the defendant \$2,600 in settlement, executing and delivering a general release, and at the same time received from defendant, as part of the settlement, a written agreement that the defendant would "adjust any claim for costs, or for any lien upon the cause of action, which plaintiff's attorneys might be able lawfully to establish. Held (1) that the amount of the lien of the attorneys, under their agreement with plaintiff and their notice to defendant, could not exceed one-third of the amount so received by plaintiff, to wit, \$866.66; (2) that there is no power in the Court to enforce the performance of the agreement by defendant in favor of the attorneys for plaintiff by summary order; and that unless said sum of \$866.66, and the costs of the motion, are paid by the defendant within a time fixed, the plaintiff's attorneys should have leave to continue the action for the enforcement and collection of their lien.

(Decided March, 1900.)

Appeal, by the defendant, from an order of the Supreme Court, made at the Kings Special Term, and entered in the office of the clerk of the county of Kings on the 5th day of January, 1900, adjusting the lien of the plaintiff's attorneys in the action and directing payment by the defendant.

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John L. Wells, for appellant.

Henry Escher, Jr. (*George F. Elliott* with him on the brief), for respondent.

HIRSCHBERG, J.—The papers on this appeal disclose the following facts: On the 6th day of November, 1899, the action was commenced by the service of a summons and complaint to recover damages for personal injuries, alleged to be due to defendant's negligence. On the same day the plaintiff made a written agreement with his attorneys by which he agreed that they should receive for their services one-third of any sum for which the case might be adjusted, and that neither party should settle the case without the consent of the other. Accompanying the summons and complaint was a notice to the defendant, signed by the plaintiff's attorneys, notifying the former that "we claim as and for our services rendered and to be rendered, as per written agreement in the above-entitled action, a lien upon any verdict, judgment, compromise or settlement that may be had or obtained herein to the extent of one-third thereof." On the 7th day of December, 1899, the plaintiff received from the defendant the sum of \$2,600, and in consideration thereof executed and delivered to the latter a general release, and at the same time received from the defendant, as a part of the settlement, a written agreement dated that day, entitled in the action, and signed on behalf of the defendant by the individual who made the settlement and paid the money, of which the following is a copy: "The plaintiff and defendant having amicably adjusted their differences, and the plaintiff having executed and delivered to the defendant a release for

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all claims arising out of the above-entitled action, and the plaintiff having made arrangements with his attorneys, Messrs. Elliott, Jones & Escher, giving them a certain lien upon his cause of action and also for costs.

"The Brooklyn Heights Railroad Company hereby agrees to adjust any claim for costs or for any lien upon the cause of action; which the said attorneys may be able lawfully to establish."

The plaintiff's attorneys thereafter, on several occasions, demanded of the defendant, through the defendant's attorneys of record in the action, adjustment and payment of their lien at the sum of one-third of \$2,600 and costs, exhibiting the original agreement fixing the lien as executed by the plaintiff. In default of payment an order was then obtained in the action, based on affidavits of the facts as stated, requiring the defendant to show cause why an order should not be made determining and establishing the amount of the lien, and directing the defendant to pay to the plaintiff's attorneys one-third of the sum of \$2,600, in addition to the costs of the action, and why such other and further relief should not be granted as may be just. The defendant read no papers in opposition upon the return of this order, but appeared by counsel who was duly heard upon the motion, and thereupon the Court granted the order appealed from by which it was "ordered, adjudged and decreed, that the lien of the plaintiff's attorneys herein, as determined and established by this Court, is for one-half of the net amount received by the plaintiff from the defendant, being one-third of the whole amount for which said action is finally adjusted; and it is further ordered, that the defendant, within five days from the service of a certified

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copy of this order upon its attorneys herein, pay to the plaintiff, for the use and benefit of his attorneys herein, Messrs. Elliott, Jones & Escher, or to said attorneys, personally, the sum of \$1,300, together with ten dollars costs of this motion."

The record does not show that any arrangement was made for a formal discontinuance of the action, nor does it show whether the settlement made by the parties was with the knowledge and assent of the plaintiff's attorneys. The pecuniary circumstances of the plaintiff are not disclosed, nor does it appear whether the defendant served an answer in the action or has, or claims to have, a defense upon the merits. It does, indeed, appear that the defendant is represented by attorneys of record, and that the settlement was made more than twenty days after the service of the summons and complaint, but these facts do not, under the circumstances, raise any presumption that the action was at issue. They are equally consistent with the service of a notice of appearance and the extension of time to answer, or even with the existence of a default, and, where a defendant is ready and willing to pay a large sum to settle an action, as fair an inference lies in one direction as in the other.

The question of an attorney's lien and the mode of its enforcement has frequently been before the Courts, but no recorded case to which our attention has been directed presents the features of this one. In the case in the books the settlement has been either in fraud of the attorney's rights, or, being made in good faith, was without any express provision for his benefit. Here the settlement appears to have been in good faith, without fraud or collusion, and the defendant has assumed and agreed to adjust

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the attorney's lien. The question would, therefore, seem to resolve itself solely into one of practice, and to require only the determination of the mode in which to enforce the defendant's agreement made in the action.

In this view the agreement of settlement is construed as an express promise on the part of the defendant to pay the plaintiff's attorneys the amount of their lien based on the sum of \$2,600, as the value of the cause of action. The appellant insists that the amount of the settlement was not conclusive upon the defendant as to the value of the cause of action, and that the agreement is not an admission that the attorneys were entitled to any fixed amount, but that the arrangement simply bound the defendant to pay whatever sum the attorneys could establish by a continuance of the action, and by proof of defendant's negligence and consequent liability to the plaintiff. The agreement should be construed in the light of the purpose intended to be accomplished by the parties. Its object was to settle the lawsuit, not to make provision for its continuance. That it has failed in its purpose of terminating the suit is the result solely of the defendant's failure to consummate the bargain. The plaintiff was and still is under a valid obligation to pay his attorneys one-third of whatever sum he secures or has secured in the litigation, and the defendant's agreement means nothing unless it means that the defendant should assume the plaintiff's liability, and so assume it as to finally release and discharge the plaintiff. In other words, the parties intended that the plaintiff should have \$2,600 freed from the attorney's lien. By making the settlement, the plaintiff said to the defendant, in effect: "I am willing to accept \$2,600 and release

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you, but if I take that sum I am under obligations, as you well know, to pay my lawyers \$866.66. If you will agree to make that payment to them in addition, and, by so doing, release me from any liability to them for that amount, I will settle the suit." The defendant must be deemed to have agreed to make such payment or the settlement would fail of its evident purpose, for as the plaintiff would otherwise still remain liable to his attorneys for the sum of \$866.66, it cannot be assumed that the defendant intended only to agree to pay or adjust such lien as the latter should be able to establish against it by a continuance of the litigation or otherwise. The lien which the defendant agreed to adjust was the attorneys' lien as against the plaintiff on the basis of a compromise of the suit for \$2,600. It follows that the order appealed from requires the payment to the attorneys of more than they have claimed or are entitled to receive, and that it is erroneous in any view to that extent.

The appellant's counsel further insists that there is no power in the court to enforce the performance of the agreement by summary order, and in this respect we think he is correct. In *Harris v. Elliott* (19 App. Div., 60), the precise question was decided, and it was held that a compromise stipulation cannot be enforced by a summary order. In that case the plaintiff agreed to pay to the moving party something over \$8,000 by way of settlement. He paid \$5,000 and refused to pay the balance, alleging that he was entitled to certain offsets or counter demands against it. The Court said: "Concerning his claim in that regard we have now nothing to say. It is plain that he cannot be proceeded against on the stipulation as an independent basis for summary action by the Court

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to compel him to complete its terms with the consequence of being adjudged in contempt for not doing so. That is not in any respect a proceeding against an attorney as such. All the relations existing between him and the moving parties are contract relations. He brought his suit to have them defined and adjusted. The moving parties have seen fit to treat with him in that action; have recognized it and agreed to settle and compromise it, and that compromise has been carried out in part. The moving parties have a full remedy. Either the suit can proceed, and they may secure their rights by judgment, or an action lies on the stipulation." See also *Taylor v. L. I. R. R.* (38 App. Div., 595), and *Matter of Cattus* (42 App. Div., 134). No authority has been cited in support of the proposition that performance of a stipulation to settle and adjust a lawsuit can be enforced by order, disobedience of which can be punished as for a contempt. The fact that the subject-matter of the application is the claim or lien of the attorney of one of the parties to the action does not affect the right in any respect. It is not a proceeding between attorney and client, and certainly not a proceeding against an attorney, who, by virtue of his position as an officer of the Court, is subject to its control and discipline, but it is a proceeding against the defendant to compel the performance of a contract made in the action with a view of adjusting it, and which it now refuses to carry out. If the arrangement had been to pay the plaintiff and his attorneys each a specified sum, and the defendant had made the payment to the attorneys but had refused to pay the plaintiff, it would hardly be claimed that payment to the plaintiff could be compelled by order, and no difference exists in principle merely

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because the money is to be paid in discharge of an attorney's lien. So far as the defendant is concerned, it is merely a payment to buy its peace in the suit, or to discharge a liability arising from its negligence.

The amendment of 1899 to section 66 of the Code of Civil Procedure does not affect the question. Among other amendments relating to the lien of attorneys, this sentence has been added: "The Court, upon petition of the client or attorney, may determine and enforce the lien." It is not necessary now to consider and decide the full scope and purport of this section, nor how far it may have extended the power of the Court to apply summary remedies in aid or settlement of the dealings and transactions between attorney and client. It is sufficient to say that it does not confer power to determine and enforce a stipulation in the action, not between attorney and client, although relating to the former's lien. In *Bailey v. Murphy* (136 N. Y., 50) the Court of Appeals held that where a judgment was satisfied by the client for less than its amount, without the knowledge of his attorney and without provision for his payment, the Court might set aside the satisfaction as against the attorney's claim, but had no power by order to determine the amount of compensation due the attorney. Judge Finch said (page 51): "On this motion the Court was not at liberty to determine the amount of compensation due to the attorney, if any, over and above the amount of the taxed costs. The latter were presumptively the measure of the attorney's right, and, if he was entitled to more by virtue of some express or implied agreement, that amount must be first liquidated in some proper action between the attorney and his

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client, and cannot be arbitrarily determined upon a motion to vacate the satisfaction entered. The client has the same right to defend against such an asserted liability as belongs to him when any other claim is alleged, the existence or amount of which he disputes." The right of a client to his day in Court and before a jury on the question of his attorney's compensation for services rendered under contract, is scarcely to be disputed, and if the amendment of 1899 was intended to deprive him of that right its constitutionality may well be doubted. But the question is not presented here. In this case the attempt is to enforce payment of an attorney's claim against one who is not his client, but who has assumed the client's obligation, and the party so sought to be charged is entitled to assert any defenses he may have in the usual form, and in the usual forum, and even to assert that he has actually made payment in accordance with the terms of his obligation and to have the issues tried by jury. It may be conceded that the defendant paid the plaintiff in this case with full knowledge of the attorney's lien, subject to the lien, and assuming and agreeing to discharge the lien, and yet there can be found in section 66 of the Code, as amended, nothing which justifies a summary order as against it, even if that section is to be construed as authorizing such an order as against the plaintiff to reach the money in his hands.

The plaintiff's attorneys are fully protected. They have their claim against their client, who has a fund of \$2,600 on which they have a lien for their compensation; and, in addition, they have the defendant's written agreement made for a valuable consideration, binding it to pay and discharge this claim and lien, and which is enforceable by action. Or they

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have the undoubted right, supported by numerous and uniform decisions, to proceed to judgment in this action for the protection and enforcement of their lien, either by default in case no answer has been served or in the usual way if the action is at issue. *Peri v. New York Central R. R.*, 152 N. Y., 521.

The order should be modified by reducing the amount of the attorney's lien from \$1,300 to \$866.66, and by providing that, unless that sum and the ten dollars costs of the motion are paid by the defendant within twenty days, the plaintiff's attorneys have leave to continue the action for the enforcement and collection of their lien.

All concur.

ROBERT ROCHFORD, RESPONDENT, v. METROPOLITAN STREET RAILWAY, APPELLANT.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, APRIL, 1900.

§ 66.

Attorney's Lien — Construction of section 66, Code of Civil Procedure.

The effect of the amendment by chapter 61, Laws of 1899, to section 66 of the Code of Civil Procedure, adding the provision that "the Court, upon the petition of the client or attorney, may determine and enforce the lien," is confined to the adjustment of differences between a plaintiff and his attorney. It enables the Court, on petition, to administer a fund in possession of the Court, so that an attorney may be protected, and to prevent the satisfaction of a judgment to the attorney's prejudice or to set aside the satisfaction of a judgment, so as to permit an attorney, if needful, to enforce his lien. Such amendment does not take away from a defendant the right to have the question of his liability and the extent thereof determined by action,

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or authorize the fixing of the lien of an attorney for a plaintiff as against the defendant summarily on petition.

(Decided April, 1900.)

Appeal from order of Special Term directing the defendant to pay money in satisfaction of attorney's lien.

Charles F. Brown, for appellant.

Alfred C. Cowan, for respondent.

O'BRIEN, J.—This proceeding was initiated by service on defendant of a petition and notice of motion, and was brought on for a hearing upon the pleadings and such petition. The action was brought to recover damages for personal injuries, due, as alleged, to defendant's negligence, and the petition shows that, by agreement between the plaintiff and his attorney, the latter was to be paid a contingent fee of one-half of the amount recovered; that the defendant settled with the plaintiff by paying him \$260 without the knowledge of the attorney, and that the plaintiff is irresponsible. The defendant submitted no papers in opposition, but objected to the payment of any amount on such summary application. The learned Judge at Special Term made an order that the defendant pay to the attorney \$130, which is one-half of the amount stated to have been received by the plaintiff in settlement, and from the order directing such payment this appeal is taken.

Section 66 of the Code of Civil Procedure relates to an attorney's compensation, and provides that he shall have a lien upon his client's cause of action, which shall attach "to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may

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come, the lien not to be affected by any settlement between the parties." In 1899 this section was amended by adding the following: "The Court, upon the petition of the client or attorney, may determine and enforce the lien." The question presented, therefore, is one of practice, whether as against a defendant who settles with a plaintiff without the knowledge of his attorney, the latter can, in a summary way, by petition, have the amount of his lien determined or whether he must proceed to enforce it in or by an action.

Prior to the amendment of 1899 to section 66 of the Code, it is clear from a review of the authorities that the lien of an attorney after a settlement by the client could be enforced in the original action or by a separate action brought for that purpose, but not in a summary way by petition or motion. In *Pilkerton v. Brooklyn Heights R. R.* (App. Div., Second Department, 30 N. Y. Civ. Pro., 276), wherein application was made upon affidavits for an order requiring the defendant to show cause why the amount of the attorney's lien should not be fixed and the defendant directed to pay the same, it appeared that a settlement was made for \$2,600, a release given and an agreement which provided that the defendant should "adjust any claim for costs or for any lien upon the cause of action which the said attorneys may be able lawfully to establish;" and the Court, stating the conclusion at which it has arrived, said: "The plaintiff's attorneys are fully protected. They have their claim against their client, who has a fund of \$2,600 on which they have a lien for their compensation; and, in addition, they have the defendant's written agreement, made for a valuable consideration, binding it to pay and discharge

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this claim and lien, which is enforceable by action. Or they have the undoubted right, supported by numerous and uniform decisions, to proceed to judgment in this action for the protection and enforcement of their lien either by default, in case no answer has been served, or in the usual way, if the action is at issue (*Peri v. New York Central R. R.*, 152 N. Y., 521)." The order entered directing payment was accordingly modified by reducing the amount and by providing that, unless the sum so fixed was paid within a certain time, the plaintiff's attorneys have leave to continue the action for the enforcement and collection of their lien.

It will be seen that the Court did not decide directly the question as to the proper practice, but undertook, upon the facts before it, to adjust the rights of the parties by suggesting what would be a proper sum for the defendant to pay, and, in lieu of such payment within the time fixed, granted leave to the attorneys to continue the action for the enforcement and collection of their lien. So far as it bears upon the question we are considering, the decision is an intimation and a strong argument in support of the contention that an order obtained upon such a summary application is not to be enforced, it being left optional with the defendant whether to pay the amount or defend the action which the attorneys were given leave to prosecute for the enforcement of their lien. Thus, in the opinion referring to the amendment of 1899 to section 66 of the Code of Civil Procedure, it was said: "Among other amendments relating to the lien of attorneys, this sentence has been added: 'The Court, upon petition of the client or attorney, may determine and enforce the lien.' It is not necessary now

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to consider and decide the full scope and purport of this section, nor how far it may have extended the power of the Court to apply summary remedies in aid or settlement of the dealings and transactions between the attorney and client. It is sufficient to say that it does not confer power to determine and enforce a stipulation in the action not between attorney and client, although relating to the former's lien. In *Bailey v. Murphy* (136 N. Y., 50) the Court of Appeals held that where a judgment was satisfied by the client for less than its amount, without the knowledge of his attorney and without provision for his payment, the Court might set aside the satisfaction as against the attorney's claim, but had no power by order to determine the amount of compensation due the attorney. * * * In this case the attempt is to enforce payment of an attorney's claim against one who is not his client but who has assumed the client's obligations, and the party so sought to be charged is entitled to assert any defenses he may have in the usual form and in the usual forum, and even to assert that he has actually made payment in accordance with the terms of his obligation and to have the issues tried by jury."

The logical deduction from *Pilkerton v. Brooklyn Heights Railroad* as to the proper practice is, that an attorney's lien, as against a defendant not his client, must be enforced by action and not by motion. In the *Matter of Lexington Avenue* (30 App. Div., 602; affirmed 157 N. Y., 678, without opinion), it was held, as correctly stated in the head-note, that "an attorney who has rendered services to an owner of property taken in a proceeding for the opening of an avenue in the city of New York, in obtaining an award for the lands so taken, is not entitled to have

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his claim for compensation under an agreement with the owner * * * determined upon a summary application by a petition entitled in the street opening proceedings * * * the payment may be enforced by action." That being a special proceeding, it was therein held that section 66 of the Code, which relates to "actions," did not apply; but that case is authority for the proposition that in a special proceeding the remedy of an attorney to enforce his lien is by action, although instances are cited where the Court, on application of the client, has proceeded in a summary way to determine the compensation due to an attorney for services rendered.

These and many other cases that might be referred to are authorities for the statement that prior to the amendment of 1899 — except in special instances such as where there is a fund in Court — the lien of an attorney is to be determined and its payment enforced not in a summary way on motion or petition, but in the usual way by an action legal or equitable. It follows that the practice thus sanctioned is not to be departed from unless expressly changed by the addition made to section 66 of the Code by the amendment of 1899.

The language of the amendment would seemingly confine it to the adjustment of differences between the plaintiff and his attorney, and, as urged by the appellant, enable the Court on petition to administer a fund in possession of the Court so that an attorney would be protected; to prevent the satisfaction of a judgment to his prejudice or to set aside the satisfaction of a judgment so as to permit the attorney, if needful, to enforce his lien. There is nothing in the language of the amendment that in terms applies to a defendant or that takes away from him the right to

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have his day in Court upon the question of his liability and the extent thereof. Whether the Legislature has power to take away the right to litigate in the usual way and in the ordinary forum the defendant's liability and its amount, involves a serious constitutional question which we are not called upon to determine, having reached the conclusion that the language of the amendment of 1899 does not relate to a defendant, but merely aims at formulating a practice which, as between the plaintiff and his attorney, will enable the latter's lien to be determined or enforced by petition and order instead of by action.

The order accordingly should be modified, without costs, by directing that the defendant should pay the \$130 within twenty days, or, in default thereof, leave should be given the attorney to prosecute the action to enforce his lien.

All concur.

WILLIAM A. NORTHRIDGE, RESPONDENT, v. ANTHONY ASTARITA, APPELLANT.

SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, FEBRUARY, 1900.

§§ 3063, 3213.

Municipal Court — Review of judgments on the facts.

It seems that an Appellate Division of the Supreme Court has not the same power to review upon the facts judgments of the Municipal Court of the city of New York which it has respecting judgments of the Supreme Court.

(Decided February, 1900.)

Motion for a reargument or leave to appeal to the Court of Appeals.

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E. Gaston Higginbotham, for the motion.

Charles F. Tabor, opposed.

HATCH, J.—We are asked to review and reverse our former decision in *Ludlum v. Couch* (10 App. Div., 603) and hold that this Court has the power to review the determination of the Municipal Court of the city of New York upon the facts, or in the event that we decline so to do, that we permit a review of such question by the Court of Appeals. The evidence in the present case was conflicting, and, under such circumstances, the Judge below was authorized to decide as he did. Upon this subject the rule announced by the Court of Appeals, and applied by the Supreme Court, has been uniform and unvarying for so long a period of time as to become firmly settled, and the rule of *stare decisis* must govern if there were no other reason.

It was said by the Court of Appeals in *Burnham v. Butler* (31 N. Y., 480), in discussing the rule to be applied in reversing judgments rendered by Justices of the Peace: "I am not aware that there has been any change of the rule in this respect since the case in the Court of Errors of *Noyes v. Hewitt* (reported in 18 Wend., 141), which affirmed the rule as laid down by Bronson, J., in *Stryker v. Bergin* (15 Wend., 491), and overruling the two cases of *Whitney v. Sutton* and *Columbia Turnpike Road v. Haywood* (10 Wend., 413, 425). That rule is, 'that where on a trial in a Justice's Court there is evidence on both sides, and even where there is only slight evidence in support of the cause of action on which there is a recovery, the County Court is not authorized to reverse the judgment, although such Court

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may arrive at a conclusion upon the facts of the case, or the weight of evidence, different from that drawn by the Justice.' This Court, then, are bound to look into the evidence so far as to see if there is any or sufficient evidence to sustain the judgment of the Justice."

In commenting upon this question, the Appellate Division, in the Third Department, said that this rule was well established and had never been overruled (*Staples v. Hager*, 42 N. Y. Supp., 458). In *Wright v. Maseras* (56 Barb., 521) it was again said that the rule requires the Court "to give the judgment of the Justice every reasonable construction to sustain it, if, from the evidence, it was possible for him to have given such a judgment as he did give" (*Thalheimer v. Lempert*, 17 N. Y. St. Rep., 346; *Patrick v. William: son*, 19 App. Div., 451). In *Robinson v. Rowland* (26 Hun, 501) the Court reached the same conclusion, holding that the question then before it was not one of conflicting proof, but was of an inference drawn from the proof, which the Court held was not warranted. The effect of this decision was to say that there was no proof in support of the judgment. In this respect the rule was the same as was applied in *Carter v. Pitcher* (87 Hun, 580) and in *Houghtaling v. Lloyd* (21 N. Y. Civ. Proc. Rep., 56). It is evident that the Court, in *Halsey v. Hart* (85 Hun, 46), did not intend to change this rule, although its expression is "the verdict is regarded as controlling unless it is manifestly and clearly against the weight of evidence," and this is clear from the disposition made of the case. This Court is fully committed to this doctrine, as appears not only in *Ludlum v. Couch* (supra), but in other cases. *City of Brooklyn v. B. C. & N. R. R.*, 11 App. Div., 168; *Norton v. Arver-*

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nam Co., 14 App. Div., 581; *Hommel v. Meserole*, 18 App. Div., 106; *Manheim v. Seitz*, 21 App. Div., 16.

Mr. Wait, in his *Law and Practice* (6th edition, pp. 1008, 1021), reviews nearly all, if not all, of the decided cases up to the time when he wrote. He announces four propositions in which the Appellate Court is authorized to review questions of fact upon appeal from a Justice's Court: 1. Where the plaintiff fails to prove a cause of action considering all of the evidence given in the case. 2. "Where the verdict is against the undisputed or overwhelming weight of evidence. 3. Where it is evident that the verdict is the result of prejudice, partiality, passion or fraud. 4. Where the Court or jury have evidently disregarded unimpeached and controlling evidence." The cases which he cites in support of his text are undoubted authority for his first, third and fourth propositions; and an examination of the authorities shows that they proceeded upon an analysis of the testimony to a conclusion that the judgment which was reversed was unsupported by the testimony which was given, or that the Court disregarded unimpeached and controlling evidence, which in effect was no more than saying that the judgment was unsupported. The reason for this rule is stated by Judge Woodruff in *Goldsmith v. Obermeier* (3 E. D. Smith, 121), that the finding must be regarded as having been founded upon some erroneous view of the law which the Court had authority to correct. All the cases cited by Mr. Wait are in harmony with the latter cases of this Court, and many others upon these propositions.

So far as his second proposition is concerned, it may or may not be upheld, dependent upon the testimony given in the case. We know of no case in

the Supreme Court or in the Court of Appeals which decides that an Appellate Court has authority to pass upon the question of the weight of testimony and apply the rule thereto applicable to a review of judgments in the Supreme Court; and none of the cases cited in the text and none others in the Supreme Court, to which our attention has been called, or which has fallen under our observation, announces such rule. On the contrary, all condemn it. The only authority resting in an appellate tribunal to review as against the weight of testimony, falls within that class of cases to which reference has been made, where upon the whole proof a given proposition is practically undisputed or there has been a disregard of unimpeached and controlling testimony. The rule of the authorities which we have cited is to the effect that where there is substantive testimony upon which the Court could possibly found a verdict, the appellate tribunal is powerless to interfere. There are some expressions to be found in *N. Y. Small Stock Co. v. Third Ave. R. R.* (13 Misc., 276), *McLaughlin v. Harriot* (14 Misc., 343), *Watson v. Dealy* (26 Misc., 20), and others which do not seem to be in entire harmony with the rule announced by the Supreme Court. These expressions, however, may be limited to refer to such a case as we have heretofore suggested, and so limited, the principle may have been correctly applied to those cases.

There is, however, authority in an appellate tribunal to reverse the judgment of a Justice of the Peace where the Court is satisfied from the whole case that the ends of justice have not been attained in the judgment which is the subject of the review (*Curley v. Tomlinson*, 5 Daly, 283; *King v. Kaim*, 60 N. Y. Supp., 264). This power is possessed by the

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the Supreme Court to reverse judgments of the Supreme Court, even though no legal error appears (*Barrett v. Third Ave. R. R.*, 45 N. Y., 628; *Chamberlain v. Lindsay*, 1 Hun, 231). This is an inherent power of the Supreme Court, which is properly applicable to all judgments that it is authorized to review, but it is evident that the cases must be rare and exceptional where this power ought to be exercised, and usually such cases will be found embraced in the third proposition announced by Mr. Wait. The same rules applicable to a Court of a Justice of the Peace are made applicable by statute to the Municipal Courts of the city of New York. In the case in which this motion is made we have examined the testimony and reached the conclusion that the case presented a conflict of evidence, and that the judgment of the Municipal Court has the support of evidence and must, therefore, stand. In view of this condition the record, even if sent to the Court of Appeals for review, would not enable that tribunal to decide the question of jurisdiction which the defendant seeks to raise. To grant his application, therefore, could do him no possible good.

Owing to the enlarged jurisdiction of the Municipal Courts of the city of New York, it would, doubtless, promote the ends of justice to confer upon appellate tribunals authority to review the judgments of these Courts to the same extent and subject to the same rules as are now applicable to the review of judgments rendered by the Supreme Court. Such relief, however, is not found in the Courts, but resides in the Legislature.

The motion for reargument, or for leave to appeal to the Court of Appeals, should be denied.

All concur.

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Power of Appellate Court to review a judgment of the Municipal on the facts.

In the decision of the Appellate Division of the Supreme Court, Second Department, in *Northridge v. Astarita*, reported above, it seems to be held that an Appellate Division has not the power to review a judgment of the Municipal Court of the city of New York on the ground that it is against the weight of evidence. The Court relies on the previous decision in the same department in *Ludlum v. Couch* (10 App. Div., 603), in which it was undoubtedly held that the errors of fact, referred to in section 3063 of the Code of Civil Procedure, for which judgments of Justices' Courts may be reversed, do not include for review questions as to the weight of evidence.

On the question of power to reverse merely on the weight of evidence, the General Term of the Court of Common Pleas formerly exercised it with regard to judgments of the District Courts of the city of New York (N. Y. S. S. Co. v. Third Ave. R. R., 13 Misc., 276, and cases cited). After the reorganization of the Courts by the Constitution of 1894, there was enacted section 3213 of the Code, particularly applying to District Courts of the city of New York, and prescribing that the appellate branch of the Supreme Court "may reverse, affirm or modify the judgment appealed from, and where a judgment is reversed, may order a new trial in the District Court," etc. Section 1367 of the charter, regulating appeals from the newly-created Municipal Court, follows practically verbatim the provisions of section 3213 of the Code relating to District Courts of the city of New York. No case, however, seems to have been decided since section 3213 of the Code became a law specifically holding that a reversal may be had because a judgment is contrary to the weight of evidence. In *McLaughlin v. Harriot* (14 Misc., 343), decided before, and *Hoffman v. Coughlin* (26 Misc., 24), decided after, the adoption of the Greater New York charter, while reversals were had on the facts, they do not seem to have been, strictly speaking, on the weight of evidence, but generally because it appeared that injustice had been done. The cases last named, therefore, are not necessarily in conflict with the limitation of power of an Appellate Division laid down in the opinion of *Northridge v. Astarita*.

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THE FIRST NATIONAL BANK OF FORT
WORTH, TEXAS, PLAINTIFF, v. AMERICAN
EXCHANGE NATIONAL BANK, DEFENDANT.

SUPREME COURT, APPELLATE DIVISION, FIRST
DEPARTMENT, MARCH, 1900.

§ 1234.

Collection of draft by purchaser in good faith — Fraudulent inducement to issue of draft held not to vitiate it.

Held, that plaintiff acquired good title to, and was entitled to enforce as against the acceptor, a draft purchased in good faith from the person to whom it was sent and for whom it was intended, although it was drawn to remit the amount of an intended loan on mortgage of real property, and was procured through fraudulent representation that the payee represented the owner of such property, and the production and delivery of a note and mortgage purporting to have been executed by such owner but which were fictitious.

(Decided March, 1900.)

Motion for judgment upon a verdict for plaintiff directed by the Trial Court, subject to the opinion of the Appellate Division.

George H. Yeaman, for plaintiff.

Michael H. Cordozo, for defendant.

MCLAUGHLIN, J.—This action was brought to recover the amount of a draft drawn by the First National Bank of Denver, Col., on the defendant, payable to the order of A. W. Hudson.

The complaint alleged the execution and delivery by the drawer of the draft, to A. W. Hudson, the payee; the indorsement, for value, by him to the

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plaintiff; acceptance by defendant; presentation for and refusal of payment and protest for non-payment.

The answer admitted the making of the draft, acceptance and defendant's subsequent refusal to pay. It denied the delivery to and indorsement by the payee and plaintiff's ownership. It then alleged, in substance, that Lenora N. Bosworth, intending to pay to one Olive K. Hudson, the owner of certain real estate at Denver, Col., or to her husband and agent, A. W. Hudson, the sum of \$2,500, purchased from the First National Bank, of Denver, Col., the draft in suit, which, by her direction, was made payable to the order of and mailed to A. W. Hudson, at Forth Worth, Texas; that it was not received by him, but was received by a person known by the name of W. A. Williams, alias C. F. Maxan, who, wrongfully and unlawfully assuming and pretending to be A. W. Hudson, indorsed the same by forging the name of A. W. Hudson thereon and sold the same to the plaintiff upon such forged indorsement.

At the trial there was little or no dispute as to the facts. It there appeared that a few days prior to the 5th of February, 1897, a stranger called upon one Thomas Fitzgerald, a real estate broker in the city of Denver, Col., and inquired of him if a loan could be obtained upon certain real estate in that city, of which one Olive K. Hudson, who resided with her husband, A. W. Hudson, at Colorado — about 250 miles from Fort Worth — in the State of Texas, held the title. In answer to the inquiry Fitzgerald said that one Lenora N. Bosworth would loan from \$2,000 to \$2,500. This stranger then informed Fitzgerald that the Hudsons were in or near Fort Worth, Texas, and, if he would give him his card,

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he would forward it to them and they would communicate direct in reference to the loan. A few days thereafter Fitzgerald received from Fort Worth, Texas, what purported to be a letter from A. W. Hudson — reference being there made to the card previously obtained — in which an application was made for a loan of \$2,000 or \$2,500 upon the real estate owned by Olive K. Hudson in the city of Denver. Considerable correspondence passed between Fitzgerald and the person signing his name A. W. Hudson, at Fort Worth, the result of which was that Mrs. Bosworth, through Fitzgerald, agreed to loan, upon this real estate, \$2,500. A note for \$2,500 and a trust deed or mortgage, as collateral security for the payment of this sum, were prepared by Fitzgerald and by him forwarded by mail to A. W. Hudson, at Fort Worth, for execution. Shortly thereafter the First National Bank of Denver received from Fort Worth a letter signed A. W. Hudson, inclosing a note which purported to be signed by Olive K. Hudson and A. W. Hudson, and a trust deed signed by Olive K. Hudson, instructing it to notify Fitzgerald that the note and mortgage had been sent to it for collection and to deliver the same to Mrs. Bosworth upon her paying to the bank the sum of \$2,500, less Fitzgerald's commissions and the expenses incurred in examining the title, with a request that the bank remit the proceeds, after making such deductions, to A. W. Hudson at Fort Worth. The Denver bank, on receiving this letter, did as directed and informed Fitzgerald that the note and mortgage had been received. Fitzgerald thereupon notified Mrs. Bosworth, who, with her attorneys and Fitzgerald, called at the bank, examined the note and mortgage, and, being satisfied with the

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execution of them, paid to the bank the sum of \$2,500, less Fitzgerald's commissions for making the loan and the expenses incurred in examining the title, and in exchange therefor received from the bank the note and mortgage. The bank, following the instructions given in the letter above referred to, drew its draft on the defendant in this action, payable to the order of A. W. Hudson, for \$2,336.90, and forwarded the same by mail to him at Fort Worth, together with a statement showing the deductions which had been made, and the draft and statement were received a few days later by the person for whom they were intended. This person then was and, for a few weeks prior thereto, had been a clerk in a hotel at that place. He was there known by the name of A. W. Hudson, and, so far as appears, that was his real name, at least it was the only name by which he was there known. He was called by that name and mail was delivered to and received by him under that name. After the receipt of the draft he showed it to one Carmichael, a lawyer of standing and well known at Fort Worth, and to the plaintiff, and requested him to go to the plaintiff bank and identify him as the payee named in the draft. This Carmichael consented to do, and he did go to the plaintiff bank and identified him as A. W. Hudson, the payee named in the draft, and thereupon the plaintiff purchased it and forwarded the same to its correspondent in New York — the Chemical National Bank — for collection. The Chemical National Bank subsequently presented the draft to the defendant and it was accepted by it, but payment was thereafter refused, upon the ground that the name of the payee had been forged. It also appeared upon the trial that Olive K. Hudson, the owner of

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the Denver real estate, never signed the note or executed the mortgage, and that her husband, A. W. Hudson, had no knowledge of or connection with the transaction until after the draft had been presented to and purchased by the plaintiff.

Upon the foregoing facts, both parties having moved for the direction of a verdict, the Trial Court directed a verdict for the plaintiff, subject to the opinion of the Appellate Division. Section 1234 of the Code of Civ. Proc.

We are satisfied that the ruling of the Trial Court is right. The plaintiff, in good faith and for value, purchased the draft from the person to whom it was sent, and for whom it was intended, and it thereby acquired a good title. The fact that Mrs. Bosworth had, by a trick or device, been induced to part with her money for a worthless note and mortgage, does not in the least affect the question. Suppose Hudson, instead of operating through the Denver bank, had gone to Denver and had there met at the bank Fitzgerald, Mrs. Bosworth and her attorneys, and he had there personally produced the note and mortgage, and Mrs. Bosworth, in exchange for them, had given him her check on the Denver bank, which he then and there had presented to the bank for payment, and the same had been paid, would not the bank be protected? Manifestly, because it would have acquired the title to the check from the person to whom Mrs. Bosworth delivered it, and to whom she intended to give the title. It is unquestionably true, as contended by the defendant's counsel, that Mrs. Bosworth supposed she was dealing with the husband of Olive K. Hudson, but this does not alter the fact that she, in exchange for the note and mortgage, gave her money to the bank, which

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the bank intended to, and did remit, by the draft in suit, to the person at Fort Worth, calling himself A. W. Hudson. That person received it, and transferred it to this plaintiff, who, as I have already said, received it in good faith and for value, and it thereby acquired good title. *Robinson v. Coleman*, 141 Mass., 219; *Forbes v. Espy*, 21 Ohio St., 474.

The indorsement was not forged. On the contrary, it was indorsed by the person in whose favor it was drawn. Nor was the Denver bank deceived in any way. It delivered the note and trust deed to Mrs. Bosworth, received her money and drew and sent, as directed, the draft to the identical person who indorsed it. No deception was practiced upon the bank. It was not cheated or defrauded in any way. It is true Mrs. Bosworth was defrauded into making a loan upon a worthless mortgage and note, but that was her own fault and not this plaintiff's. The draft was not made by her or drawn at her request. She had nothing whatever to do with this, except to make it possible by accepting the note and mortgage. Had she exercised the care which good business judgment would seem to have dictated, in ascertaining the validity of the signatures on the note and mortgage, she would, undoubtedly, have discovered the fraud before she parted with her money. She, however, so far as appears, took no precaution whatever, apparently assuming that A. W. Hudson, of Fort Worth, was the husband of Olive K. Hudson, and that he had a right to represent and do business for her.

In principle, this case is much like *Robinson v. Coleman* (supra). There a person went to a hotel in the city of Boston and registered under the name of Charles Barney, and, on the day he arrived, or the

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day following, he took to the place of business of the defendant, who sold property as an auctioneer, a horse and carriage, of which he represented himself to be the owner, and which he requested the defendant to sell for him. He gave his name as Charles Barney. The defendant there, believing him to be the person by that name who lived at Swanzey, sold the horse and carriage and gave him a check in payment. The check was made payable to Charles Barney. The person to whom it was delivered indorsed it under that name, delivered it to the hotel-keeper in payment of his hotel bill, and received the balance in cash. Shortly thereafter the defendant ascertained that the horse and carriage had been stolen, and the bank, by his direction, refused to pay the check. There it was made to appear that Charles Barney was not the true name of the person who received the check, and that he had never gone by the name before registering at the hotel. In an action to recover the amount of the check, the Court held: "That, although the defendants may have been mistaken in the sort of man the person they dealt with was, this person was the person intended by them as the payee of the check, designated by the name he was called in the transaction, and that his indorsement of it was the indorsement of the payee of the check, by that name. The contract of the defendant was to pay the amount of the check to this person, or his order, and he had ordered it paid to the plaintiff. If this person obtained the check from the defendants by fraudulent representations, the plaintiff took it in good faith and for value." See, also, *Am. Exc. Bk. v. City Bk.*, 5 N. Y. Leg. Ob., 18; *Merchants' Loan and Trust Co. v. Bank of the Metropolis*, 7 Dailey, 137.

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It is well settled that if one of two innocent parties must suffer, by the act of a third, he who enables the third party to do what he did must sustain the loss (*Rawles v. Didhler*, 4 Abb. Ap. Cases, 12; *McTilliam v. Mason*, 31 N. Y., 294). We think this principle is applicable here. Mrs. Bosworth, without knowing the signature of either Olive K. Hudson or that of her husband, without making any examination or taking any precaution to ascertain whether the signatures to the note and mortgage were forgeries, paid to the bank the amount of money called for, and the bank did just what it was obliged to do — forwarded to the person who sent the note and mortgage to it, a draft payable, as directed, to the order of that person — A. W. Hudson. That person received it; that person indorsed it, and upon that indorsement it was acquired by the plaintiff for value, and it did not thereafter lie in the power of Mrs. Bosworth, the Denver bank or anyone else to prevent the plaintiff from realizing upon it.

In reaching this conclusion, the authorities cited by defendant's counsel have not escaped our attention. They have been considered, but they do not seem to be in point. They relate mostly to forged indorsements or to the liability of common carriers.

It follows that judgment for plaintiff must be ordered upon the verdict, with costs.

All concur.

Howarth v. Angle.

LEONARD HOWARTH, AS RECEIVER OF THE
TRADERS' BANK OF TACOMA, RESPONDENT, v.
CHARLES E. ANGLE, APPELLANT.

COURT OF APPEALS, FEBRUARY, 1900.

§ 394.

State comity — Action by foreign receiver against citizen of this State — Statute of Limitations.

An action may be maintained in the Courts of this State by the receiver of an insolvent bank of another State against a stockholder residing here to recover of him his equal and ratable proportion of the debts of the bank, under a liability imposed by a statute of the foreign State, where it appears that the deficiency and defendant's proportion thereof have been judicially determined in the foreign State and also here, and where the provisions of the foreign statute fixing the liability work no injustice to him and are not contrary to the policy of this State. One who takes stock in a bank of another State impliedly agrees to bear the burden of the law of that State governing the transaction, and his liability thereunder is an asset which vests in a receiver of the bank upon its insolvency.

Where an action by the receiver of a foreign corporation to collect assets, under the authority of the Court which appointed him, works no detriment to any citizen of this State and is not repugnant to its policy, our Courts will not refuse to extend the usual State comity.

(Decided February, 1900.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, affirming a judgment entered upon a decision after a trial without a jury.

This action was brought by the plaintiff, as receiver of an insolvent bank in the State of Washington, to recover the equal and ratable proportion of an alleged deficiency claimed to be due from the

defendant on account of his ownership of sixty-five shares of the capital stock of said bank. Upon the trial the following facts, among others, were found by the Court:

The bank in question, incorporated under the laws of the territory (now State) of Washington, became insolvent in May, 1894, and, on the nineteenth of that month, the plaintiff was duly appointed receiver thereof, "and of all its property and assets, real and personal, of whatsoever nature," by a Court of general jurisdiction in that State, but the defendant was not a party to the action. The bank had a capital of \$500,000, divided into 5,000 shares of the par value of \$100 each, and prior to the appointment of the plaintiff as receiver, as well as ever since, the defendant owned sixty-five shares. From the organization of said bank the statutes of Washington have provided that the stockholders of every bank incorporated thereunder "should be held individually responsible, equally and ratably, and not one for the other, for all the contracts, debts and engagements of the bank accruing while they remain such stockholders, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." They further provide for the appointment of a receiver by the Superior Court whenever a corporation becomes insolvent, with "power, under control of the Court, to bring and defend actions, take and keep possession of property, receive rents, collect notes and generally to do such acts, respecting the property in his hands, as the Court should authorize."

Said statutes have received judicial construction in the highest Court of said State, which established the law "that a receiver of an insolvent corporation,

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appointed under and in accordance with said laws, and under circumstances similar to those under which plaintiff was appointed receiver, as aforesaid, became and was a receiver for all of the creditors of the respective corporation or association of which he was so appointed receiver, and a quasi assignee, and invested with the title to all rights of action possessed by his principals, and was entitled to bring and defend, in his own name, as such receiver, any and all actions involving the property, funds and effects in his hands, as receiver, or concerning the persons represented by him, including the creditors of such corporations. * * * That the liability of the stockholders of a banking corporation, organized under the provisions of the laws of the said State, as above quoted, was a contingent and secondary liability to be enforced after all other assets of said bank had been exhausted and was provided for the benefit of all creditors of said bank, and became a part of, and added to, the funds and property of such bank in the possession of the receiver thereof, and the title to which was in said receiver, as a trust fund, for the purpose of satisfying the claims of such creditors; and that such trust funds, including said contingent and secondary liability of the stockholders of such bank, were all assets in the hands of such receiver, and should be adjusted in receivership proceedings, and that such receiver had the right, under the direction of the Court, to enforce the said contingent and secondary liabilities and every liability of whatsoever nature which the Court might find necessary in order to pay the amount owing to the creditors, and that the receiver of such corporation, and not the individual creditors themselves, was and is the proper person to sue upon and enforce

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the said liabilities against the stockholders of such insolvent banking corporation."

The Trial Court further found as follows:

"Tenth. That at the time the defendant became the owner and holder of sixty-five shares of stock in the said bank, as aforesaid, the provisions of the laws of the State of Washington, as stated above, as interpreted by the Courts of that State, were in full force and became a part of the said defendant's contract of purchase and ownership of said shares of stock, and said defendant in and by his purchase and ownership and holding of said sixty-five shares of stock of said bank, as aforesaid, contracted and agreed, for a valuable consideration, that he would be, and remain, individually responsible, equally and ratably with the other stockholders of said bank, for all contracts, debts and engagements of said bank accruing while he remained such stockholder to the extent of the amount of his stock therein at the par value thereof, to wit, to the amount of \$6,500 in addition to the amount invested in said shares; and that it is provided by the laws of the said State of Washington that an action to enforce said liability or any liability under the said contract and obligation is transitory and may be brought by a receiver, as aforesaid, in any Court of general jurisdiction in any State where personal service can be made upon said stockholder.

"Eleventh. That while the said defendant remained a stockholder of said Traders' Bank of Tacoma and the owner of sixty-five shares of its stock of the par value of \$100 each, as aforesaid, certain contracts, debts, engagements and obligations duly accrued against said Traders' Bank of Tacoma, upon which, after exhausting and applying the pro-

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ceeds of all property and assets of said bank of whatsoever nature, there still remains due and owing the sum of \$131,670.40, and that the equal and ratable proportion of the said deficiency due from said defendant on account of the sixty-five shares of the capital stock of said bank owned by him, as aforesaid, and on account of the contract and agreement entered into by him at the time of his purchase and ownership, as aforesaid, and in accordance with the provisions of the statutes and laws of the State of Washington, is the sum of \$1,712.10.

"Twelfth. That prior to the commencement of this action and prior to the making of the assessment hereinafter referred to, plaintiff, as receiver of the Traders' Bank of Tacoma, as aforesaid, and acting under orders of the said Superior Court of the State of Washington for the county of Pierce, had duly and regularly collected in and sold and disposed of all property and assets of said Traders' Bank of Tacoma, real, personal and mixed, and of whatsoever kind and nature, except the said contingent or secondary liability against the stockholders of said bank, and had distributed the money so collected and the proceeds so realized to the several creditors of the said Traders' Bank of Tacoma entitled thereto, as was duly found and ordered by the said Superior Court last above named; and that after so selling and disposing of all of the assets of said bank, and on or about the 17th day of March, 1897, upon a full report and showing to said Superior Court last above named, and upon full proof of the facts above stated and of the condition of said bank, an order and judgment of said Superior Court was duly made and entered in said cause No. 11,673 by said Superior Court of the State of Washington for the county of

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Pierce, adjusting all the affairs of said receivership and the liabilities of the stockholders of said bank and finding and adjudging the aggregate amount of the several deficiencies upon the several contracts, debts and engagements which had accrued against said bank prior thereto to be the sum of \$131,670.40, and further ordering, directing and adjudging that plaintiff, as receiver, as aforesaid, at once levy an assessment upon the several stockholders of said bank equal to 26 34-100 per cent of the par value of the stock of said bank, which was by said judgment found to be an assessment sufficient and necessary to make up the full amount of said deficiency and which said judgment directed that said assessment be paid forthwith to said plaintiff, as such receiver, at Tacoma, Pierce county, Washington, in cash, on or before the 24th day of April, 1897, and which said judgment further ordered and directed said plaintiff, as such receiver, to forthwith give notice to and make demand upon the several stockholders of said bank for the amount of the respective assessments upon them on account of their several proportions of the capital stock of said bank, and authorized and directed him, said plaintiff, as such receiver, to proceed forthwith by suit brought in his own name, as such receiver, against all stockholders, if any, who refused to pay their respective portions of such assessment, or any portion thereof, according to the said terms and demands. * * *

The receiver thereupon levied an assessment on the several stockholders of the bank, in accordance with said judgment, of 26 34-100 per cent upon the par value of said stock. Before the commencement of this action he gave notice of such assessment to the defendant, as one of said stockholders, and

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demanding payment of his proportionate amount of the assessment and deficiency, amounting to \$1,712.10.

Upon the refusal of the defendant to pay said sum, this action was brought for the recovery thereof, and the Trial Judge directed a judgment in favor of the plaintiff for the amount, with interest and costs. That judgment was unanimously affirmed by the Appellate Division, and the defendant now comes here.

Horace McGuire, for appellant.

Porter M. French, for respondent.

VANN, J.—The appeal book contains but three exceptions, two of which relate to findings of fact, and cannot be here considered, because the affirmance was unanimous. The third relates to the conclusion of law; and, hence, the sole question presented is whether the facts found authorize the judgment directed. None of the evidence is returned, except certain extracts from the Constitution and statutes of Washington, and an abstract of the testimony of a lawyer, practicing in that State, relating to the construction placed by its highest Court upon them.

The findings show that the judgment of the Trial Court is not founded simply upon the judgment of the Washington Court appointing a receiver and the assessment made pursuant thereto, for the organization and insolvency of the Tacoma bank, the amount of the deficiency and defendant's proportion thereof, are found as independent facts, which are presumed, from the state of the record before us, to have been

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established by common-law evidence. The defendant's liability and the amount thereof do not depend upon the Washington judgment, the only necessary function of which, in this action, was to establish the title of the plaintiff and his right to sue.

While the plaintiff is called a receiver, the name does not measure his power, for he represents all the creditors and stockholders of the insolvent corporation, and is authorized to maintain such actions as are necessary to recover the assets, among which is included the cause of action set forth in the complaint. He is not a mere custodian, but "a quasi assignee * * * invested with the title to all rights of action possessed by his principals," and entitled to bring "any and all actions involving the property, funds and effects in his hands, as receiver, or concerning the persons represented by him, including the creditors of such corporation." The statutory liability of stockholders is an asset of the insolvent bank, "the title to which was in said receiver, as a trust fund for the purpose of satisfying the claims" of creditors.

While a foreign receiver cannot sue in this State, as a matter of right, "still our Courts uphold the title of a foreign assignee or receiver upon the principle of comity. If the title is by virtue of a voluntary conveyance or transfer, it is sustained as against all, including even domestic creditors; but, if it depends on a foreign statute or judgment, it is sustained against all, except domestic creditors. * * * Every remedy to gather in the assets is afforded, unless it would interfere with the policy of the State or impair the rights of its own citizens" (*Mahon v. Ongley Elec. Co.*, 156 N. Y., 196, 201). This is made very plain by the learned opinion of the Appellate

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Division, which leaves nothing to be said upon the subject. *Howarth v. Angle*, 39 App. Div., 151.

It was not necessary that all the stockholders should be before the Washington Court when the order was made appointing the plaintiff receiver and giving him authority to sue, any more than when a decree in bankruptcy is made, which binds all who are not parties, the same as those who are (*Sanger v. Upton*, 91 U. S., 56). That judgment may be regarded as a proceeding in rem, binding upon all the world, so far as title to the assets of the corporation is concerned, and, according to the decisions of the highest Courts of the State where it was made, the so-called statutory liability of stockholders is part of the assets.

The defendant took stock in the Tacoma bank, subject to the burden of the law, which he impliedly agreed to bear, as he could not otherwise have become a stockholder (*Lowry v. Inman*, 46 N. Y., 119). That burden is an asset, vested in the receiver, and can be enforced in this State the same as a promissory note, not because the laws of Washington are in force here, but because the defendant voluntarily assented to the conditions upon which the bank was organized. As was said in the case last cited: "A personal liability of stockholders for the debts of a corporation, in virtue of the charter, is not in the nature of a penalty or forfeiture, and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed, by the act of becoming a stockholder. * * * It is like other obligations, assumed in the form prescribed by the laws of the place where made, and, being valid there, is enforceable everywhere. Its validity, interpreta-

tion and effect are to be determined by the *lex loci*; but the remedy is governed by the *lex fori*." While the liability is, for convenience, frequently called statutory, because the statute, which is the constitution of the bank, affixed the obligation to the ownership of stock, it is, in fact, contractual and springs from an implied promise. There is no substantial difference between the liability for an unpaid balance on a stock subscription, which is an express contract to take stock and pay for it (*Stoddard v. Lum*, 159 N. Y., 265), and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock, from which a contract is implied, to perform the statutory conditions upon which stock may be owned (*Richmond v. Irons*, 121 U. S., 27, 55). The fact that the former is the promise of a principal, and the latter of a surety, does not affect the question. The express promise runs to the corporation and may be enforced by it, while the implied promise runs to the creditors, and may, according to the common law of the State where it was made, be enforced for the benefit of creditors by a receiver of the corporation appointed to wind up its affairs. The latter promise is not a part of the capital stock of the bank, but is a substitute, required by statute, for the personal liability of a partner at common law, and has the same object, which is the protection of creditors.

The stockholders, however, may controvert in our Courts all the essential facts, such as insolvency, the amount of the deficiency and the like, whether they are established by the judgment appointing the receiver or not. They may require strict common-law proof as to all the facts upon which the defi-

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ency is based, and may contest any unreasonable expenditure in the conversion of assets and the collection of accounts, including extravagant allowances to attorneys or counsel. Upon all these questions the defendant has had his day in the Courts of this State, and the united action of the Courts below have conclusively determined them against him.

If the statute, upon which the personal liability of the stockholders is founded, had also provided for that liability, such remedy would have been exclusive and could not have been enforced in the Courts of this State. It was said in *Pollard v. Bailey* (87 U. S., 520, 527), "the liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by a statute without a remedy may be enforced by an appropriate common-law action." The statute of Washington, however, provided no remedy, but left that subject to the Courts, to be worked out according to the common law. The learned counsel for the appellant recognizes the distinction between foreign statutes, which create a liability and provide a remedy, and those which create a liability, but do not provide a remedy. He admits that, according to the law of this State, in the former class only the remedy provided by the foreign statute can be pursued, while in the latter it depends upon inter-state comity. He insists, however, that the procedure against resident stockholders of a foreign corporation must be in substantial accordance with the practice established in the State where the action is brought, and this is true to the extent that no departure from that practice is permitted, which results in injustice to the

citizens of that State, or is against the public policy thereof. He relies upon the case of *Marshall v. Sherman* (148 N. Y., 9), where the action was not brought by a receiver, but by a creditor of an insolvent bank in Kansas, to recover the amount of a deposit after a receiver had been appointed in that State. The action was founded upon a local statute, which not only created the liability, but also provided a peculiar and complicated remedy unknown to our Courts, and which could not be entirely enforced in this State (*Lowry v. Inman*, 46 N. Y., 119; *Christensen v. Eno*, 106 N. Y., 97, 103). The liability was neither contractual, in the general sense, nor penal, but the statute charged the property of the stockholder with the debts of the insolvent corporation to the extent of the stock held by him. It was the case so aptly described by Judge Allen in *Lowry v. Inman* (*supra*), where the intent of the Legislature "was not to create a general, personal or property liability, but to charge the property of the stockholders, and that not generally, or by the usual and ordinary process, but conditionally, and by a peculiar and unusual procedure, only available in the Courts of that State, not only limiting and prescribing the security and rights of the creditor, and the obligation and liability of the stockholder, but prescribing the remedy going with it and as a part of the right." The assets had not been marshaled or appropriated for the benefit of creditors and there was no way to determine, with any degree of accuracy, the amount of the deficiency or how much the defendant ought to pay. The action, if it had not been arrested by the demurrer interposed to the complaint, would naturally have resulted in the appropriation by one creditor, alone, of that which

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belonged to others equally with himself. Under these circumstances we declared that "when the Courts of this State are asked to administer the statutes of Kansas, and we can see that the case is surrounded by such complications, and the circumstances are such that it cannot be done without injustice to our own citizens or that it will be impossible to do full and complete justice to all the parties in interest, it is reasonable and just to decline to administer them at all."

In that case the amount of the deficiency was not ascertained in any way by a Court or otherwise; the action was not brought by a receiver; the remedy sought was that provided by the foreign statute, which created the liability; that remedy could not be wholly enforced in this State, and, to the extent that it could be enforced, might result in injustice to our citizens. In this case the action is brought by a receiver, who, according to the decisions of the Washington Courts, has the title to the right of action, and the amount of the deficiency has been definitely ascertained both by the Courts of that State and of this. It does not appear that there is any other stockholder or any creditor in this State, or that injustice will be done to any citizen of this State by sustaining the judgment appealed from. The reasons given by the Court for denying relief in *Marshall v. Sherman* are met by the facts of this case, which distinguish it in many essential respects and permit a recovery under the principles sanctioned, but not applied in that case, because the necessary facts were wanting.

It is not necessary that the procedure to enforce the liability in question should be that required by statute in this State in the case of domestic cor-

porations, as that would frequently be impossible and would withhold the right of comity altogether. Any provision of our statutes which makes the recovery of judgment against the corporation and return of execution unsatisfied essential to the maintenance of an action against a stockholder cannot ordinarily be complied with in the case of a foreign corporation, because service of process cannot be had (Laws 1890, ch. 564, § 58; *Hirshfeld v. Bopp*, 145 N. Y., 84). However, the provision of the Stock Corporation Law, above cited, did not apply even to a domestic banking corporation on the 18th of May, 1897, when this action was commenced, because, on the day before, section 52 of the Banking Law was so amended as to require the enforcement of liability against stockholders by action in the name of the receiver (Laws 1892, ch. 689, § 52; Laws 1897, ch. 441, § 1). Said amendment also answers the criticism of the appellant that if the right of action was in a creditor, instead of the receiver, the defendant would have had the benefit of the Statute of Limitations. Code Civ. Proc., § 394.

It is sufficient if the method of procedure in our Courts is such that no injustice is done to the defendant or to any citizen of this State, and the established policy of the State is not interfered with (*Willetts v. Waite*, 25 N. Y., 577, 585). No injustice was done the defendant by the judgments below, because he was only required to pay his exact proportion of the deficiency, as duly ascertained by the Courts of this State. The fact that the deficiency had also been ascertained by the Courts in Washington and the same amount found to exist did no harm. There is no inequality, for one creditor is not paid in full, while others get less, but all are benefited equally,

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and no one gets more than his due. Justice is done to all and injustice to none. While only a single stockholder was made a party to the action, he was the only stockholder, so far as appears, who could be served in this State.

If some of the stockholders should prove insolvent, the defendant cannot be affected by it, or his liability increased thereby. Under the Federal Banking Law, which contains the same provision as to the liability of stockholders, in the same words as the statute in question, it was held that there was no power to direct a second assessment to supply the deficit caused by the inability of the receiver to enforce payment from such stockholders as were insolvent or beyond the jurisdiction. It was also held that the effect of the words "equally and ratably, and not one for another," was to make the liability several, and not joint, and to protect each stockholder from liability for the default of another. It was distinctly announced "that the shareholders were not intended to be put in the relation of guarantors or sureties one for another, as to the amount which each might be required to pay," and that "the insolvency of one stockholder, or his being beyond the jurisdiction of the Court, does not in anywise affect the liability of another." *U. S. v. Knox*, 102 U. S., 422; see, also, *Matter of the Hollister Bank*, 27 N. Y., 293; *Crease v. Babcock*, 10 Metc., 525; and *Morse on Banking*, 503.

The defendant, therefore, cannot be made to pay more than once nor more than his share, whether others pay or not. No resident of this State is affected, except the defendant, from whom nothing is required, except what he impliedly contracted to pay. The policy of the State is not contravened, for

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that policy requires the enforcement of the statutory liability of stockholders of insolvent corporations by an action, in the name of a receiver, to recover the proper proportion of the deficiency from each stockholder for the benefit of all the creditors. As was said in *Stoddard v. Lum* (supra): "The plaintiff does not come here seeking to remove assets from this State to the possible prejudice of domestic corporations, but asks that he be permitted to enforce against our own citizens the performance of contracts into which they have entered in another jurisdiction."

When an action by a foreign receiver to collect assets, under the authority of the Court which appointed him, works no detriment to any citizen of this State, and is not repugnant to its policy, it would be a provincial and narrow view for our Courts to refuse to extend the usual State comity. There is a close business connection between the citizens of the different States of the Union. Investments are freely made in other States by the citizens of this State, who need the aid of the Courts of the jurisdiction where the investments are made. The comity which we expect to have extended to citizens of our State, we cannot, in justice, refuse to citizens of other States. State lines should not prevent justice from being done. Our Courts should not close their doors to a receiver from another State, who comes here, armed with the title to a just claim against a citizen of this State, and offers to establish by common-law evidence the liability of that citizen. While we should keep control of the subject, so as to see that no discrimination is practiced against our citizens, or injustice done them, either as to the substance of the liability or the method of

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procedure, when the same result is attained in practically the same way as, under similar circumstances, would be attained in the case of a domestic corporation, there is no reason for withholding that aid which is now afforded by the Courts of almost all enlightened countries.

The judgment should be affirmed, with costs.

PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN and LONDON, JJ., concur; O'BRIEN, J., not voting.

Judgment affirmed.

HENRY MERZBACH, APPELLANT, *v.* THE
MAYOR, ALDERMEN AND COMMONALTY OF
THE CITY OF NEW YORK, RESPONDENTS.

NEW YORK COURT OF APPEALS, MAY, 1900.

§ 3298.

Notary public — Presumption of right to recover legal fees.

One who renders services as a notary public is presumed to be entitled to the legal fees. It is error, therefore, in an action to recover such fees, for the Trial Court to charge that the burden is upon the plaintiff to establish an agreement, express or implied, that he was to be paid. The burden, on the contrary, is upon the defendant to show that payment was not to be made. So held in an action brought by one who, while connected with the District Attorney's office of the city of New York, acted as a notary, his duties in the office not expressly including such services, and he having notified the District Attorney, at whose request they were rendered, that he should charge for them, which notice was received without objection. (*Decided May, 1900.*)

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Depart-

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ment, affirming a judgment entered in favor of the defendant upon the verdict of a jury.

William Victor Goldberg, for appellant.

John Whalen, Corporation Counsel (*Theo. Connolly* and *Terence Farley*, of counsel), for respondents.

VANN, J.—Between June 11, 1885, and December 31, 1890, the plaintiff occupied a subordinate position in the office of the District Attorney of the city and county of New York, and received the salary fixed by law for his services rendered in that capacity. During said period, at the request of the District Attorney, he also rendered services as notary public by administering oaths and taking acknowledgments required by the people in the various proceedings connected with the criminal business of the county. This action was brought to recover the fees allowed by law for thus acting as notary, and the defendant pleaded, as a distinct defense, that the services alleged, if any, were rendered by the plaintiff voluntarily, without any agreement that he was to receive payment therefor.

Upon the trial evidence was given tending to sustain the allegations of the respective pleadings. It was not denied that the plaintiff, in fact, rendered the services at the request of the District Attorney, and that they were necessary in the transaction of his official business; that some of the fees sued for were collected and retained by the city when judgments were paid; that the District Attorney had authority to incur such expenses, and that an appropriation was made each year for the payment thereof through the Comptroller. In June, 1885, the plaintiff, as he testified, told the District Attorney then in

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office that one of his bills for services as notary, which had been duly approved, had been rejected by the Comptroller, and that the District Attorney answered: "You ought to get paid. You are entitled to it." After this he opened an account with the city and rendered bills repeatedly, but the Comptroller refused to pay them, even when they had been approved by the District Attorney or under his direction. It was his custom to send in a bill once or twice a year. During the first three years, while he was messenger for the District Attorney, his charges amounted to less than five dollars, but during the last three, while he was librarian, they amounted to over \$370. There was no controversy as to the amount or the accuracy of his charges. He testified that he told the District Attorney and his successor that he should charge for his services, and no objection was made by either. Subsequently his bills, although duly approved in some instances, were repudiated by the Comptroller, including a portion of those involved in this action. The duties to which the plaintiff was assigned as messenger and librarian did not include the rendition of services as notary. There was no arrangement when he entered the office that he was to take affidavits and acknowledgments, either with or without compensation. The District Attorney testified that he had no recollection of authorizing payment for notary's fees, and that the custom in his office was not to pay such fees to salaried officers. It did not appear that the plaintiff was appointed notary through the influence or upon the recommendation of the District Attorney, or as a convenience to the latter. Each alternate year, when reappointed by the Governor, he paid from his own means the fee of \$10 required by

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law upon filing his official oath with the county clerk. L. 1892, ch. 683; L. 1893, ch. 248; L. 1894, ch. 88.

The only question submitted to the jury, as stated by the Trial Judge in his charge, was "whether there was an express or an implied contract on the part of the District Attorney, representing the city, that this man should have not only the salary the city had agreed to give him, but extra compensation for those affidavits. That is the question I submit to you, and on that the determination of this case must hinge. That is the pivot on which it turns and which must control its final disposition." The jury found for the defendant, the Appellate Division affirmed, two of the Justices dissenting, and the plaintiff comes here. Upon the first trial the plaintiff succeeded, but the judgment was reversed for a reason that has no application to the present appeal. *Merzbach v. Mayor*, 10 Misc., 131.

The Trial Court instructed the jury, in substance, that unless they found there was an agreement, express or implied, that the plaintiff should be compensated for his services in taking affidavits and acknowledgments in addition to the salary he received, they should find a verdict for the defendant, to which the plaintiff excepted. At the request of the counsel for the defendant the Court further charged "that the burden is on the plaintiff on all the issues," and the plaintiff again excepted.

Two issues were joined by the pleadings, the first of which, tendered by the plaintiff, was whether he rendered the services in question at the request of an officer authorized to contract for the same. The second, tendered by the defendant, was whether the services were rendered voluntarily, with no agree-

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ment that they were to be paid for. This was an affirmative defense in the nature of a confession and avoidance. The burden of proof is on the party who tenders the issue, because he who affirms must produce the proof to sustain his affirmation. The one who denies may rest on the weakness of his opponent's evidence, but the one who affirms must rest on the strength of his own evidence. As to the allegations of the complaint, the burden of proof was upon the plaintiff, and as to the affirmative defense pleaded in the answer, the burden of proof was upon the defendant. Thus, each party had an affirmative issue to maintain, as each alleged the facts tendering the issue, which made a burden remaining throughout the trial. *Ei incumbit probatio, qui dicit, non qui negat* is a maxim, both of the civil and the common law which applies to this case. The test is, which party must touch the issue first, or which will prevail thereon if no evidence is given? Clearly upon the issue tendered by the complaint the defendant must have succeeded, and upon that tendered by the answer, the plaintiff, if no evidence had been introduced relative thereto.

The plaintiff held two public offices at the same time, but, as neither was incompatible with the other, he was entitled to the emoluments of both so long as he was permitted to hold both. The Consolidation Act expressly excepts the position of notary public from the prohibition against holding more than one office (L. 1882, ch. 410, § 55). As the functions of a notary public require no time to speak of, they could be performed by the plaintiff without interfering with his duties as messenger or librarian. The defendant, for whom he rendered services in that capacity, was liable to him for the legal fees, not

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by virtue of a contract, but by operation of law (*Fitzsimmons v. City of Brooklyn*, 102 N. Y., 536). By force of the statute any officer authorized to administer oaths, take acknowledgments and certify the same, is entitled to certain fees therefor (Code Civ. Proc., § 3298). The plaintiff was such an officer, and was entitled to the fees, unless he waived his right thereto, either expressly, of which there was no evidence, or impliedly, of which there was some evidence. As he actually rendered the services at the request of an officer authorized to bind the defendant for the expense thereof he was entitled to recover the legal fees, unless the defendant established a waiver (1 R. S., 385, § 3; Consol. Act, § 27). Those services were not incidental to his duties as messenger or librarian but were wholly independent thereof. When he was requested to act as notary he was not asked to discharge a duty required by his appointment to a local office by the District Attorney, but one due from him as a State officer under the appointment of the Governor (*People v. Rathbone*, 145 N. Y., 434). There was no connection between the two offices, which were distinct in their origin and nature, as well as in the compensation attached thereto. If extra duty, however onerous, had been imposed upon the plaintiff as messenger or librarian, he would not be entitled to additional compensation therefor, because a public officer, with a fixed salary, is bound to perform the duties of his office for the compensation provided by law (Const., art. 3, § 28; *Hatch v. Mann*, 15 Wend., 45; *People v. Supervisors*, 1 Hill, 362). If his powers or duties are increased, even by statute, and his salary is untouched, he must submit or resign (1 Dillon Munic. Corp. [4th ed.], 233; 1 Beach Pub. Corp., § 170). The plaintiff does not

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claim extra compensation as librarian, but ordinary compensation as notary. His services as notary were not, and could not, be rendered by him as librarian. They did not belong to the latter office, for, acting in that capacity, he could not perform them. The District Attorney could not direct him, as librarian, to take an acknowledgment, and, as notary, he had no control over him. In that capacity he was not a subordinate, but an independent officer, acting wholly upon his own judgment, solely responsible for his own negligence and entitled to compensation, in the absence of an agreement to the contrary, the same as if he had held no other office. When he acted as notary he rendered a service which had no connection or affinity with any power or duty of his other office (*Converse v. United States*, 6 U. S., 463). There was nothing in common between the two offices, for the line of separation, both as to power and compensation, was as distinct as if they had been held by different persons. While the situation of the parties was such as to require slight evidence to establish an implied agreement that the plaintiff was to make no charge for acting as notary, the evidence presented a question of fact which was so close that three juries have disagreed in relation to it. The burden of proof, according to the pleadings, as well as the undisputed facts, rested upon the defendant to show that there was an understanding between the parties that the plaintiff should not charge for his services (*Smith v. Long Island R. R.*, 102 N. Y., 190, 192). The jury, however, were instructed, in substance, that the burden was on the plaintiff to establish an agreement that he should be paid, whereas they should have been instructed that the burden was upon the defendant

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to establish an agreement that he was not to be paid. The charge of the Court as to the burden of proof deprived the plaintiff of an important legal right, which is presumed to have affected the verdict, and the judgment appealed from should, therefore, be reversed and a new trial granted, with costs to abide the event.

GRAY, BARTLETT, MARTIN, CULLEN and WERNER, JJ., concur; PARKER, Ch. J., not sitting.

Judgment reversed, etc.

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF
THE ACCOUNTS OF WILLIAM STEENCKEN AND
HERMAN BOLTE, AS EXECUTORS OF THE LAST
WILL AND TESTAMENT OF CHRISTIAN KOCH (ALSO
KNOWN AS COOK), DECEASED.

SUPREME COURT, APPELLATE DIVISION, FIRST
DEPARTMENT, MAY, 1900.

§ 2692.

Accounting of executors — Death of one executor during pendency of proceeding.

A proceeding for an accounting by executors does not abate by the death of one of them. Although no power exists in the Surrogate to make a decree charging the deceased executor personally in respect of property of the estate in his hands, without bringing in his personal representatives, the original proceeding may be continued as against the surviving executor to dispose of all property of the estate which was in the hands of the survivor, or, having been in the possession of both the executors, vested in the possession of the survivor at the death of his co-executor.

(Decided May, 1900.)

Matter of Steencken and Bolte.

Appeal from order of the Surrogate denying motion to enter a decree for want of power.

Louis Cohen, for appellant.

James P. Niemann, for respondents.

RUMSEY, J.—William Steencken was temporary administrator of the estate of Christian Koch, and Steencken and Herman Bolte were the executors of Koch after the probate of his will. In December, 1895, Steencken filed his accounts, as temporary administrator, and at the same time he and Bolte filed their accounts, as executors of Koch's estate. Objections were filed to that account. It was referred to a Referee, and a hearing upon the matter was had. The Referee filed his report in the month of September, 1896. No action seems to have been taken upon it until the month of October, 1899, when the Surrogate, having had the matter brought before him, overruled the objections to the report, and decreed that it should be confirmed. After that had been done it was ascertained that Steencken had died after the filing of the Referee's report; and upon that fact being brought to the notice of the Surrogate, he made an order denying the application to enter an order confirming the Referee's report and for a decree directing the distribution of the estate, on the ground of want of power, because the personal representatives of the deceased executor were necessary parties. From that order this appeal is taken.

So far as it concerns the accounting by Steencken, as temporary administrator, there can be no doubt that the proceeding abated upon his death (In re Schlesinger, 36 App. Div., 77). So, also, the right

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of the Surrogate to enter any personal decree against Steencken, in respect of his accounts, as executor, abated by his death; but it does not follow from that fact that the Surrogate was correct in refusing to enter any decree whatever in the matter. The two executors took the estate as joint tenants (1 R. S., 727, § 44; Real Property Law, § 56). When one of them died all his interest in the estate vested in the surviving executor (*In re Kreischer*, 30 App. Div., 313-315), and it was his duty to proceed to complete the distribution of the estate (Code of Civ. Proc., § 2692). After Steencken's death, therefore, all the property which had been in the hands of the two executors of Koch came, by act of the law, into the hands and possession of Bolte, and he, as surviving executor, was bound to go on and complete the distribution of the estate. Proceedings for an accounting, so far as he was concerned, still existed, and, although the Surrogate, by the death of Steencken, lost any power to make a decree which would charge Steencken personally in respect of the property of the estate which was in his hands, if there was any such, yet no reason is apparent why he should lose the power of proceeding against Bolte and dispose of all the property which was in his hands or having been in the possession of both of the executors vested in the possession of Bolte at the death of his co-executor.

In actions against partners and trustees, in respect of the joint property, where, when one of them dies, all the property vests in the other, as survivor, and it is not necessary to discontinue the action or to substitute the personal representatives of the deceased partner or trustee for the purpose of establishing a liability against the firm or the estate; but in such

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cases the action may be continued against the living defendant by filing upon the record a suggestion of the death and an order continuing the proceeding against the living person. We see no reason why this procedure should not be pursued in this matter. We are not advised as to the precise nature of the liability adjudged against these executors by the Referee's report, but it is fair to assume by what appears in the papers that the report of the Referee established the amount which they had in their hands. So far as that is concerned, a decree may still be made to distribute the property which is in the hands of Bolte, as executor, or that may have come into his hands, as surviving executor, or to make such other decree as may be necessary to protect the rights of the parties, although not to charge Steencken personally with any liability. It may be, too, that if the fact is that Steencken has in his hands property of the estate for which he should file his accounts personally, that the Surrogate, in the exercise of his discretion, may postpone the entry of a decree until such steps should be taken, either by the surviving executor or by the Surrogate himself, under section 2606 of the Code of Civil Procedure, to establish Steencken's liability; but, so far as the property of the estate is in the hands of the surviving executor, we see no reason why a decree may not be entered against him fixing the amount in his hands and disposing of the estate.

For this reason the Surrogate erred in refusing to enter any decree, and the order must be reversed, with costs, and the matter remitted to the Surrogate in order that he may proceed upon the lines here indicated.

All concur.

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Generally.—Section 2692 provides that where one of two or more executors or administrators dies or ceases to act or be able to act for reasons stated in the section, a successor shall not be appointed, except where such an appointment is necessary in order to comply with the express terms of a will, but the others may proceed and complete the administration of the estate, pursuant to the letters, and may continue any action or special proceeding brought by or against all.

Personal representatives for what held liable.—The general rule is that an executor or an administrator is personally liable only for their own acts, and is responsible only for the property of the estate that may come into his possession (Paulding v. Marvin, 3 Redf., 365; N. ; Paulding v. Sharkey, 88 N. Y., 432; Taylor v. Shult, 4 Dem., 528). And he parts with the possession of such at his peril. Matter of Storm, 28 Hun, 499; Matter of Demarest, 1 Connolly, 200.

Death of personal representative—Position of successor—Beneficiaries.—Under section 2606 of the Code of Civil Procedure an executor or administrator of a deceased executor or administrator may voluntarily account for any of the trust property of the original decedent which has come into his possession. But he must cite the surviving executor or administrator or other party necessary to attending such an accounting. But, while the Surrogate has power to compel such an accounting, the personal representative of such deceased executor or administrator cannot be compelled to account generally, and any property of the estate which he may have in his possession can only be delivered to the successor or other personal representative of the original decedent.

None of the original beneficiaries under the original will can take from him nor compel him to deliver to them. Matter of Trask, 27 Civ. Proc. Rep., 7.

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THE AULTMAN & TAYLOR COMPANY, APPELLANT, v. FREDERICK J. SYME ET AL., RESPONDENTS.

NEW YORK COURT OF APPEALS, MAY, 1900.

§§ 1239, 1245, 1246, 1251, 1375.

Execution issued without leave of Court — Method of computing five years prescribed in section 1375, Code of Civil Procedure — Execution not void though issued after lapse of period.

Where a judgment was recovered and entered on November 14, 1889, and execution thereon was issued, without leave of Court, on November 14, 1894, held that the execution was not issued within five years after the entry of the judgment, within the meaning of section 1375, Code of Civil Procedure. (Vann and Cullen, JJ., dissenting.)

An execution issued, without leave, after the lapse of five years, is not void, but only liable to be set aside on motion. (Decided May, 1900.)

Appeal from a judgment of the Appellate Division, First Department, reversing a judgment in favor of the plaintiff, entered upon the decision of the Court at Special Term, and dismissing the complaint.

William H. Blymyer, for appellant.

Edward F. Brown, for respondents.

WERNER, J.—The plaintiff brought a creditor's action to set aside an assignment made by the defendant, Frederick J. Syme, and his wife, the defendant, Mary A. Syme, of the interest of the former in the residuary estate of his uncle, David H. Syme.

The Court below held that the evidence was insufficient to sustain the conclusion of the Trial Court

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that said assignment was fraudulent; also, that the execution on plaintiff's original judgment was issued without leave after the statutory period of five years, and was, therefore, void.

As this view of the case left the plaintiff no foundation for the present action, the complaint was dismissed. The question whether said execution was issued within five years from the recovery of plaintiff's original judgment depends upon the method of computing time from that event. If the day of the recovery of the judgment is included in the statutory period, then the execution was not issued "within five years after the entry of judgment;" if that day was excluded, it was issued in time. Both parties invoke the provisions of the Statutory Construction Law in aid of their conflicting contentions upon this question. That law (ch. 677, L. 1892, as amended by ch. 447, L. 1894), so far as applicable here, declares that (§ 27) "the day from which any specified number of days, weeks or months of time is reckoned shall be excluded in making the reckoning." No similar provision is made for the computation of years. Under section 25 of this act we find two definitions of a year: "The term year in a statute, contract or any public or private instrument means three hundred and sixty-five days. * * * In a statute, contract or public or private instrument, the term year means twelve months." The late General Term of the First Department, in a previous litigation between the parties to this action (91 Hun, 632), held that under this statute the rule which governs days, weeks and months is not applicable to periods of years. The Appellate Division of the Second Department in *Connecticut National Bank v. Bayles* (17 App. Div., 596), decided that the statutory rule for

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reckoning days, weeks and months was equally applicable to periods of years.

In the effort to ascertain which of these two rules should be applied, let us first examine the question in the light of the statute as it now stands. It specifically declares that "the day from which any specified number of days, weeks or months is reckoned shall be excluded in making the reckoning." The statute makes no provisions for computing periods of years. It is urged for the appellant that we may supply, by implication, the rule which is specifically provided for the computation of days, weeks and months. Upon this assumption it is said that as a year is composed of twelve months, the designation of "months" among the periods which are within the rule is equivalent to including "years" as well.

The difficulty with this argument lies in its hostility to a fundamental principle of statutory construction.

Expressio unius est exclusio alterius applies to a case like this. While this maxim will not be permitted to defeat the obvious legislative intent where it conflicts with the letter of a statute, such intent must, nevertheless, be discernible in the context of the statute itself.

As has been observed, the law under consideration contains no other reference to the method of computing time than that above referred to. Had the Legislature intended to apply that method to periods of years, it could have disposed of the whole subject in a single sentence, by saying that the day from which any specified period of time is to be reckoned shall be excluded from the reckoning. But it did not say that. The silence of the statute in this

regard is, therefore, significant of the legislative intent to exclude from its operation other periods than those enumerated. We do not think that this rule of statutory construction is rendered inapplicable, because, as suggested on behalf of the appellant, a "year" and "twelve months" are, for all practical purposes, one and the same thing. A year, twelve months, fifty-two weeks and three hundred and sixty-five days all denote the same total period of time. If the statute had simply provided that the "day" from which any specified number of "days" is reckoned shall be excluded from the reckoning, it could hardly be contended that, because there are 365 days in a year, therefore, the Legislature intended to apply the same rule of computation to years as to days. But there would be quite as much force in such a contention as there is in the argument that, because a year is composed of months, the same rule must apply to both. It is to be observed, moreover, that the question under consideration has to do, not with a single year, but with years. The appellant's argument, carried to its logical conclusion, amounts to this: "A year consists of twelve months; therefore, the rule, as applied to months, holds good for any period of years." It may be admitted, for the purposes of this discussion, that a divided or double rule of computation has its conveniences and difficulties; so has every other. All rules for computing time are purely arbitrary. If it were not for the terms of the statute and the rights which have become fixed by virtue thereof, one rule would, perhaps, be as good as another. So much for the statute as it now exists. Let us examine its history.

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In 1830 the Legislature first enacted a law for the computation of time. This statute did not furnish a rule for computation, but simply defined the legal meaning of the terms "years," "months," etc.

In 1848, by chapter 379 of the laws of that year, the Legislature adopted what was known as the Code of Procedure, section 368, which constitutes chapter 10 of that Code, provided: "The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded." This section, without change, was embraced in the amended Code of Procedure adopted in 1849, but from that time until 1877 it was known as section 407 of the Code of Procedure.

In 1877 the Legislature adopted the Code of Civil Procedure. Section 788 of that Code provided that "the time within which an act in an action or special proceeding brought, as specified in the last section, is required by law to be done, must be computed by excluding the first and including the last day, except where it is otherwise specially prescribed by law. If the last day is Sunday or a public holiday, it must be excluded. Where the act is required to be done within two days, and an intervening day is Sunday or a public holiday it must also be excluded." This section remained a part of the Code until it was expressly repealed by the Statutory Construction Law. Chap. 677, Laws 1892.

An examination of all the Codes referred to reveals the fact that they contained the usual provisions relating to the periods of time within which acts of legal practice were required to be performed. Among these were the sections containing what are familiarly known as the Statutes of Limitation and

those relating to the enforcement of judgments. Then as now, a party recovering a judgment could issue execution thereon, as, of course, at any time within five years after the entry of judgment.

Referring, again, to said section 368 of the Code of Procedure (afterwards 407), it will be observed that the rule of computation therein set forth referred to acts to be done as therein provided. The rule thus laid down was somewhat circumscribed by section 788 of the Code of Civil Procedure, which limited the rule for computing time to acts required by law to be done "in an action or special proceeding." It is perfectly plain, therefore, that under the several Codes, as they existed from 1848 to 1877, the time within which all acts to be done as therein provided, was to be computed by excluding the first day and including the last. This clearly embraced the issuance of an execution, as, of course, within five years after the rendition of the judgment upon which it was based. If we assume that the issuance of an execution upon a judgment is an act "in an action or special proceeding," then the issuance of an execution within five years was still governed by the same rule of computation under said section 788 of the Code of Civil Procedure, as under the previous Codes. But, by chapter 677 of the Laws of 1892, said section 788 of the Code of Civil Procedure was repealed. In the effort to enact a rule for the computation of time which would be applicable to all statutes, legal proceedings and contracts, the Commissioners of Statutory Revision omitted by a single word to make the statute as broad as their report said it was intended to be. If we apply the ordinary rules of statutory construction, we must clearly hold that by the repeal of the provisions of the Code of Civil Procedure,

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above referred to, the rule for the computation of time, which was thereby made applicable to all legal proceedings provided for in the Code, was also repealed. As the issuance of an execution relates to the remedy, and not to the right of a party recovering a judgment, it is governed by the law in existence at the time of its issuance.

We, therefore, return to the consideration of the statute as it stands. As we have already suggested, the well-known and settled rules of statutory construction require us to hold that the terms "days, weeks and months" do not include "years." On the contrary, the very omission to specify years as among the periods to be governed by the rule which is made applicable to the shorter periods, seems to furnish the strongest ground for the exclusion of the longer period from its operation. But let us look a little further and ascertain to what extent, if at all, this question is affected by other considerations than those which are presented by this statute and its history.

By reference to the Code of Civil Procedure, we find that section 1239 requires county clerks to make a minute on the back of each judgment-roll "of the time of filing it, specifying the year, month, day, hour and minute."

Section 1245 requires such clerks to docket each judgment "in its regular order and according to its priority."

Section 1246 requires such clerks, when entering a judgment to note "the day, hour and minute when the judgment-roll was filed, and the day, hour and minute when the judgment was docketed."

Section 1251 provides that "a judgment * * * binds, and is a charge upon, for ten years after filing

the judgment-roll, and no longer, the real property and chattels real, in that county, which the judgment debtor has," etc.

These sections of the Code make it apparent that a judgment creditor is first entitled to an execution upon his judgment at the moment when the judgment-roll is filed and the judgment is docketed; and a judgment becomes a lien upon the judgment debtor's real property and chattels real from that time. The law does not recognize fractions of days. The day on which a judgment is docketed, therefore, becomes the first day of its existence. While these provisions of the Code refer and relate primarily to the priority of judgments, the time when execution may issue and when the creditor's lien attaches, it is manifest that in the absence of some statutory rule to the contrary, they also fix the time when periods of limitation begin to run, unless we can say that a judgment may be in force on one day for one purpose, and not be alive until the next day for another purpose.

As we have seen, there is nothing in the Statutory Construction Law which requires or permits such a result, unless we have power to supply, by implication, the manifest omissions in the letter of the statute. But it seems to us that these practical difficulties cannot be overcome by implication. They will yield to nothing less than an arbitrary and positive statutory mandate. In the absence of such a guide the leadings of logic and consistency point more strongly in the direction of a rule which will be productive of harmonious results in all questions affecting the existence and enforcement of judgment than towards an arbitrarily uniform rule for the computation of time.

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But it is said that the cases in this and other jurisdictions in this country evince an almost uniform tendency on the part of the Courts to so construe statutes of limitations as to give parties the longest time in which to assert rights or perform obligations. That there is such a tendency in some jurisdictions other than our own may be admitted without subscribing to the manifold inconsistencies upon which it rests. In the effort to adjust the rules applicable to statutes of limitation to the equities of particular cases, many Courts have lost sight of these rules altogether, while others have sought to fortify their conclusions by the citation of authorities resting upon clearly distinguishable grounds. As a result, there is a great diversity and confusion among the cases, but, unless we are prepared to follow this tendency without regard to reason or principle, we must, in the absence of a statutory rule to the contrary, hold that the periods of limitation relating to judgments begin to run from the moment of their existence. Since the law, as we have seen, ignores fractions of days, this seems to be the logical and necessary result. The first day must be counted, unless there is a statute which otherwise provides. For the purpose of illustrating, not only the hopeless confusion into which the Courts have drifted upon this subject, but also the points of difference between the question before us and those decided in some of the cases relied upon by the appellant, we will briefly analyze a few of them. We will first examine the decision in other jurisdictions.

In *Griffith v. Bogart* (18 How. [U. S.], 158), the statute there under consideration provided that an action should not be commenced after the expiration of eighteen months from the specified event. It was

held that the first day should be included. This was decided to be the common-law rule. The Court, however, added: "If the statute in question were one of limitation, whereby the remedy of the creditor would have been lost, unless execution had issued and sale had been made within eighteen months, probably a different construction might have prevailed. Yet, even in such cases the precedents differ."

In *Arnold v. United States* (9 Cranch, 104), where it was contended that a statute did not take effect until the day after its passage, it was held that, as a general rule, "where the computation is to be from an act done the day on which the act is done is to be included."

In *Perry v. Prov. Life Ins. Co.* (99 Mass., 162), an insurance policy provided for defendant's liability if the insured should die within ninety days from the happening of the injury; held, that the day of the accident should be included.

In *Taylor v. Brown* (147 U. S., 640), the Supreme Court construed the statute prohibiting the conveyance of lands owned by Indians for a period of five years from the issuance of a patent therefor. The day of such issuance was included, and the Court said: "While it is desirable that there should be a fixed and certain rule upon this subject, it must be conceded that the rule which excludes the terminus a quo is not absolute, but that it may be included when necessary to give effect to the obvious intention."

In *Dutcher v. Wright* (94 U. S., 553), the Court, in computing the four months preceding the filing of a petition in bankruptcy, excluded the day of filing, and said: "It must be admitted that it is difficult, if

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not impossible, to deduce from the reported decisions any rule that will apply to all cases,"

In *Bemis v. Leonard* (118 Mass., 502), it was held that in computing time from the day, or from the day of the date, or from a certain act or event, the first day is to be excluded, unless a different intention is manifested by the instrument or statute under which the question arises.

In *Weeks v. Hull* (19 Conn., 376), the question arose upon the presentation of claims within six months from the issuance of an order of the Probate Court; held, that the day of the issuance of the order should be excluded.

In *People v. Barry* (93 Mich., 542), the statute provided that the service of summons issued by Justices of the Peace should be at least six days before the time of appearance named therein; held, that the day of service should be excluded and the appearance day included. To the same effect is *Shelton v. Gillett* (79 Mich., 173).

In *Cromelein v. Brinck* (29 Penn. St., 522), it was held that where a statute provides two years in which to redeem lands from tax sales, the day of the sale should be excluded.

Brown v. City of Chicago (117 Ill., 21) was a case in which the statute required ten days' notice of a special assessment; and it was held that the day of the publication of the notice was to be excluded in computing the time.

McColloch v. Hopper (47 N. J. L., 190) was an action for money in which the six years' Statute of Limitations was applied; held, that the day of the terminus a quo was to be excluded.

In *Hageman et al. v. Ohio Building Association* (25 Ohio St., '87), it was held that in computing the

time for which a notice of sale on execution should be advertised before the day of sale, the day on which the notice was first published may be included and the day of sale must be excluded.

In *Kottenbrock v. Cracraft* (36 Ohio St., 585), it was held that when a statute which repeals a prior statute on the same subject is to take effect from and after the day named, it does not take effect until the expiration of the day named.

In this State there is less of conflict in the cases than there is in other States. This is probably due to the fact, in part at least, that from 1848 to 1892 all legal proceedings embraced within the provisions of the Code were governed by the rule for the computation of time therein contained, but, aside from the statutory history of this subject, a glance at the cases in this State is sufficient to show that appellant's contention does not, as is claimed, rest upon undoubted authority. On the contrary, no case is brought to our attention which cannot easily be differentiated from the cases at bar.

The case of *Mygatt v. Washburn* (15 N. Y., 317) was brought to recover damages against an assessor who had illegally assessed the plaintiff for personal property. Among other defenses, that of the six years' Statute of Limitations was interposed. Without attempting to explain the theory upon which it proceeded, this Court held that, excluding the day on which the act complained of was done and including the other, the action was commenced within six years, and, therefore, not barred by the statute. It is quite evident, however, that the rule there applied was in conformity with that adopted in *Cornell v. Moulton* (3 Denio, 12), *Osborn v. Moncure* (3 Wend., 170), *Davidson v. Budlong* (40 Hun,

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245), and *McGraw v. Walker* (2 Hilt., 404). These were actions upon promissory notes in which it was held that the statute did not begin to run until the day after the date when the notes fell due.

In *Morss v. Purvis* (68 N. Y., 225), *Snyder v. Warren* (2 Cow., 518), and *People ex rel. Collier v. Sheriff* (19 Wend., 87), it was held that a judgment debtor whose lands have been sold under execution is entitled to the full redemption period of one year, and, therefore, the day of the sale must be excluded from the computation.

Buchanan v. Whitman (151 N. Y., 253) was an action arising upon a lease under which the practical construction given to it by the parties was permitted to control the expiration of the term. Then there are cases relating to legal practice, of which the following are examples: *Taylor v. Carbine* (8 How. Pr., 385), *Ex parte Dean* (2 Cow., 605), *Hoffman v. Duel* (5 Johns., 232), *Irving v. Humphrey* (Hopkins Ch., 364), *Vandenburgh v. Van Rensselaer* (6 Paige, 147), *People v. N. Y. C. & H. R. R. R.* (28 Barb., 284), *Haden v. Buddensick* (49 How. Pr., 241), and *Marvin v. Marvin* (75 N. Y., 240).

The cases last cited, with one or two exceptions, which do not affect the questions at issue, all relate to matters of practice in actions or special proceedings involving short periods of time, which were clearly governed by the Code provisions as they existed from 1848 to 1892.

It will thus be seen that we cannot hold that the Statutory Construction Law was intended to provide for a uniform rule for the computation of time, including "years," as well as "days, weeks and months," unless we ignore the statute, as well as the ordinary rule of statutory construction. Under

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existing conditions this can be accomplished only on the theory that what ought to be shall be. This is not the rule by which statutes are to be construed. We, therefore, conclude that the plaintiff's execution was not issued within five years. But it does not follow that plaintiff's execution was fatally defective. On the contrary, an execution issued without leave after the lapse of five years is not void, but only liable to be set aside on motion. *Bank of Genesee v. Spencer*, 18 N. Y., 150-154; *Union Bank of Troy v. Sergeant*, 53 Barb., 424.

In this it differs from an execution against a deceased person, which is an absolute nullity. *Prentice v. Bowden*, 145 N. Y., 342.

We think, therefore, that it was error for the Appellate Division to dismiss the complaint. The judgment of the Court below should be modified so as to grant a new trial instead of dismissing the complaint, and, as so modified, affirmed, without costs of this appeal to either party.

CULLEN, J.—This is a judgment creditor's action brought to set aside an assignment made by the defendant, Frederick J. Syme, to his wife, the defendant, Mary A. Syme, of the former's interest, as residuary legatee, in the estate of an uncle, David H. Syme. The learned Appellate Division not only decided that the evidence was insufficient to uphold the finding of the Trial Court that the assignment was fraudulent, but further held that the execution on the plaintiff's original judgment, which is the foundation of the present action, was issued after the statutory period of five years (Code Civ. Proc., § 1375), and, hence, was void. On this latter ground instead of granting a new trial the Court dismissed the complaint absolutely. The plaintiff's judgment

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was recovered and entered on November 14, 1889; the execution thereon was issued on the 14th day of November, 1894. The first question presented, therefore, involves the proper computation of time, and is whether the 14th day of November, 1894, is within five years from the 14th day of November, 1889, upon which day the judgment was entered. The Statutory Construction Law (§ 27) provides that, for the purpose of reckoning time, "the day from which any specified number of days, weeks or months of time is reckoned shall be excluded in making the reckoning." No similar provision is made by the statute in the case of computation of years. For this reason the late General Term of the First Department, in a previous litigation between these parties (91 Hun, 632), held that the rule which governs computation of days, weeks or months does not apply to years, and that, as the plaintiff could have issued an execution on the very day on which it entered its judgment, that day was not to be excluded in the calculation of time. We think that there is no force in the argument based on the omission to include years in the provision of section 27 cited. In section 25 of the same statute are found two definitions of a year: "The term year in a statute, contract or any public or private instrument, means three hundred and sixty-five days," and "in a statute, contract or public or private instrument, the term year means twelve months." Therefore, whatever lapse of time is three hundred and sixty-five days or twelve months, and nothing else is a year, and reference to years in section 27 was unnecessary. If the rule declared in the court below is to prevail, this incongruity seems necessarily to follow. Two obligations for the payment of money are made bearing date the

same day, one to be discharged within a year, the other within twelve months. These obligations would mature, and upon a failure of performance the obligors come into default, not on the same day, but on succeeding days. And this, too, in spite of the declaration of the statute that a year means twelve months. Nor is the consideration that the plaintiff might issue an execution on the same day on which he enters his judgment controlling. Not only under our statute, but generally throughout the country, fractions of days are not considered, and a day is treated as a mere point of time not having duration; but, of course, a day, in fact, is not a mere point of time, but has substantial duration. It, therefore, necessarily follows that, when a day is taken as a point of time and its fractions ignored, any rule of computation must either extend or diminish the accurate period of time computed. The difficulty is inherent in the subject and impossible to avoid. It is true that, under the rule declared by the statute, as we interpret it, the plaintiff may have a longer period than five years composed of 365 (366 days in leap years) of twenty-four hours each, within which he may issue an execution, but it is equally true that, under the rule laid down by the court below, the plaintiff would have less than a full five years of time within which he could issue the writ. The situation necessarily presents merely a choice between two inaccuracies, and the almost uniform tendency of the courts has been to adopt the one which gives a party the longest time in which either to assert a right or perform an obligation. Such was the law in this State prior to the enactment of the Statutory Construction Law (*Vandenburgh v. Van Rensselaer*, 6 Paige, 147; *Snyder v. Warren*, 2 Cow.,

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218; *Ex parte Dean*, 2 Cow., 605; *Homan v. Liswell*, 6 Cow., 659; *People ex rel. Colyer v. Sheriff of Broome*, 19 Wend., 87; *Cornell v. Moulton*, 3 Denio, 12; *Davidson v. Budlong*, 40 Hun, 245; *Mygatt v. Washburn*, 15 N. Y., 316; *Morss v. Purvis*, 68 N. Y., 225), and this court has held that the statute "discloses no intention * * * to materially change the existing rule for the computation of time except, perhaps, to more definitely fix the event from which the count is to be made (*People v. Burgess*, 153 N. Y., 573). Such is also the rule in the Federal courts (*Sheets v. Selden's Lessee*, 2 Wall., 177, 190; *Dutcher v. Wright*, 94 U. S., 553). The case of *Taylor v. Brown* (147 U. S., 640) does not overrule these earlier cases; though in that case the day on which the patent was issued was included in the computation of time. The decision is placed on the doctrine enunciated in *Griffith v. Bogart* (18 How. [U. S.], 158). Where the exclusion of the day of the date is invoked, not to void a forfeiture confirming a title, but to destroy one, it will not be adopted. It must be confessed that the courts have at times juggled with the computation of time, and computed it in that mode which supported what they have considered the equities of the parties in the particular cases. But no case can be found in the Supreme Court of the United States which either directly or in the argument of its opinion includes the day of the date of an act for the purpose of upholding a bar of the Statute of Limitations. The rule that the day of the date should be excluded prevails in most of our sister States (*Bemis v. Leonard*, 118 Mass., 502; *Weeks v. Hull*, 19 Conn., 376; *Cromelien v. Brink*, 29 Pa. St., 522; *Brown v. City of Chicago*, 117 Ill., 21; *McCulloch*

v. Hopper, 47 N. J. L., 189). The execution was, therefore, issued in time.

But, if I am incorrect in this view as to the proper method of computing time, still the plaintiff's case was not fatally defective. An execution issued without leave, after the lapse of five years, is not void, but only liable to be set aside on motion (*Bank of Genesee v. Spencer*, 18 N. Y., 150, 154; *Union Bank of Troy v. Sergeant*, 53 Barb., 424). In this it differs from an execution against a deceased person, which is an absolute nullity (*Prentiss v. Bowden*, 145 N. Y., 342). The judgment of the Appellate Division, dismissing the complaint, is, therefore, erroneous.

We are also inclined to the opinion that the evidence in the case was sufficient to support the findings of fact made by the trial court, and that the Appellate Division erred in holding to the contrary. The question, however, is not now one of practical importance. Pending this appeal the order of the Appellate Division has been resettled so as to show that the reversal was on questions of fact as well as on those of law. Therefore, unless the evidence conclusively established the right of the plaintiff to recover, we have no jurisdiction to review the determination of the Appellate Division as to the facts. No attack is made on the *bona fides* of the debt of \$10,000 owing by the defendant, Frederick J. Syme, to his wife, Mary A. Syme, in consideration of which the former assigned to the latter his interest in the residuary estate of David H. Syme. The transfer, not being voluntary, was not fraudulent, as matter of law, even if the assignor was insolvent at the time. The fact that the debtor assigned to his wife for the sum of \$10,000 an interest in an estate on which she realized, within thirty days, a sum

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exceeding \$60,000, would seem very strong evidence of fraudulent intent on the part of both parties. Still, the inference is one of fact and not law (Wait on Fraud: Conv., § 232). On the evidence in the case the insolvency of the debtor at the time of the transfer was also a question of fact.

The judgment should be modified so as to grant a new trial, instead of dismissing the complaint, and as so modified affirmed, without costs of this appeal to either party.

PARKER, Ch. J.; GRAY, BARTLETT and MARTIN, JJ., concur with WERNER, J.; VANN, J., concurs with CULLEN, J.

Judgment modified, etc. .

KOPP v. WHITE, AS GRAND TREASURER, ETC.

SUPREME COURT, NEW YORK COUNTY, SPECIAL
TERM, MAY, 1900.

§ 1919.

*Voluntary association — Masonic lodge — Reinstatement when —
Governed by what rules.*

Individuals who form themselves together into a voluntary association for a common object may agree to be governed by such rules as they think proper to adopt, if there is nothing in them in conflict with the law of the land, and those who become members of the body are presumed to know them, to have assented to them and they are bound by them.

(Decided May, 1900.)

Action against the Grand Lodge of Free and Accepted Masons of the State of New York, brought

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under section 1990 of the Code of Civil Procedure, to reinstate plaintiff as a mason.

Hill, Sturcke & Andrews, attorneys for plaintiff.

Elbert Crandall, attorney for defendant.

STOVER, J.—This is an action against the Grand Lodge of Free and Accepted Masons of the State of New York, brought under section 1919 of the Code of Civil Procedure, by which it is sought to have the plaintiff reinstated as a Mason. The plaintiff was accused and convicted of having, in a communication to the grand master of Masons of the State of New York, in insulting and scurrilous epithets grossly abused the grand master. He was served with a copy of the charges, and a notice of the time and place of trial, and appeared before the commissioners appointed for the trial of the charges, but does not seem to have made or served an answer to the charges that were made. Upon the first meeting of the commissioners the plaintiff was represented by counsel, the complainant also being represented by counsel. The chairman of the commission asked if the defense had any objection to any of the commissioners, and the plaintiff's counsel, instead of answering the question, thereupon stated that he desired to ask the commissioners certain questions in regard to the matter. Counsel for the complainant thereupon asked the counsel for the accused to define his position, stating that if he desired to challenge the commissioners the Code pointed out the way to do so. Counsel for the accused thereupon stated that there were no specific reasons in his mind why the commissioners should not act. He was again asked by the commissioner, "Has the defense any specific

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challenge against the commissioners?" to which the counsel for the accused answered, "I challenge all the commissioners." The chairman thereupon inquired the grounds of the challenge to the commissioners, and the counsel for the accused refused to state any grounds, but insisted upon a right to examine the commissioners in advance of any challenge. The chairman having stated that the challenge must be based upon some certain ground, and that if there were any grounds they should be stated and put upon the record, otherwise a challenge could not be sustained, and after a refusal by counsel for the accused to state the grounds of the challenge, the defense withdrew from the trial, the counsel for the accused stating: "The defense withdraws from this trial, and is not before this commission any further." Thereupon the defendant was asked by the prosecution to take the stand; his counsel announced that he would not take the stand, and after some considerable exchange of views the accused left the room. The trial was thereupon adjourned, and upon the adjourned day the commission met, it being stated that the accused had been notified of the meeting and requested to be present; but not appearing, the commission proceeded to take the testimony, and made its adjudication, finding the accused guilty of the charges as specified, and sentencing him to expulsion from the order. The sentence of expulsion was afterwards duly affirmed by the commission of appeals, which is the Masonic appellate tribunal, and this action was subsequently fully approved by the Grand Lodge at its annual communication in June, 1899. It is claimed, on behalf of the plaintiff herein, that he has been deprived of his right under the Code of Procedure of the Masonic order; that his trial was not

legal; that his conviction was unjustified, as based upon hearsay evidence; that the evidence was insufficient to establish the proof of the charges, and that the punishment was too severe. The theory of the plaintiff seems to be that the Court has power to review, not only the questions of jurisdiction, but also the questions of procedure that have arisen from time to time during the course of the trial and appeals. In the case of *White v. Brownell* (4 Abb. Pr. Rep. [N. S.], 162) the distinction between the expulsion of members of a corporation and those of voluntary associations, such as the Masonic order, is pointed out, being this: The privilege of membership in an unincorporated, voluntary association, like the one under consideration, is not given by statute or derived through prescription as in a corporation, but is created and conferred by the organization itself, and may be withheld or conferred at the pleasure of the association, and under such rules and restrictions of the association as it may see fit to establish. While in a corporation the rights are conferred by statute and under the law of the land, a person complying with the requirements of the statute, or the law, may become a member of the corporation without the consent of the corporation itself, unless such consent is rendered necessary by the law. And, as was said in the case above cited, a member of an unincorporated voluntary association has as such, undoubtedly, rights which the law will protect, but they do not rest upon the same grounds, and are in nowise co-extensive with the franchise enjoyed by a member of a corporation. And again, "individuals who form themselves together into a voluntary association for a common object, may agree to be governed by such rules as they think proper to adopt,

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if there is nothing in them in conflict with the law of the land; and those who become members of the body are presumed to know them — to have assented to them — and they are bound by them." They may provide modes of trial and means of expulsion. So that in this case the question under consideration is the same as in the case of *White v. Brownell*, whether the plaintiff here has been expelled in accordance with the laws governing the organization of which he was a member. As to the first error alleged, namely, that set forth in paragraph 11 of the complaint "a," that the trial commissioners repeatedly ordered the plaintiff to take the stand as a witness for the prosecution to testify against himself, it cannot be well founded, for the reason that the plaintiff did not take the stand as a witness, and, therefore, was not prejudiced by the request of the commissioners. Second. That the communication was privileged, and therefore there can be no conviction for it, is also not well founded, for the reason that the statements there made were not necessary in the course of the proceeding, but were all facts and circumstances, if they existed, entirely outside of the matter under consideration, and had no relevancy to the matters under discussion between the grand master and the plaintiff herein. As to the objection marked "c," that it constituted no offense against the Masonic Law, and that the conviction was not authorized, it seems to me was a question for the Masonic courts to decide, and is not open to inquiry in this Court; but, even if it were, this Court might well hold that a communication which charged the grand master of an organization with using the organization for his own private purposes, and charging by innuendo that the commission which had thereto-

fore convicted him of a Masonic offense were incompetent, unfair or unworthy, and declining to appear before a new commission if they "are to be constructed of the same Masonic ashler" as the former commission, and charging the grand master with using political methods inside the fraternity, and with dereliction in his duty as grand master, with incompetent and glaring mismanagement, and calling upon some of the brothers to return "some of their ill-gotten but ill-concealed?" and concluding by stating that the acts charged in the letter might be the means yet of impeachment of the grand master, if not libelous upon its face, was of such a character as to render the member of the organization making the charge subject to such discipline as the duly constituted authorities of the order might, in their judgment, see fit to exercise. As to the objection marked "d," the constitution of the Grand Lodge provides that when charges are preferred between members of different lodges, the district deputy grand master of the district shall, by his warrant, appoint a commission who shall hear and determine the charges (art. 19, § 126 of the constitution). These charges were preferred by a member of a different lodge from that to which the plaintiff belonged, and the commission was legally appointed under section 126. As to the next error alleged in the complaint, that his challenges were not sustained, the counsel seems to have been led into error by the course of procedure that is sometimes adopted in Trial Courts, namely, that a challenge is presumed to be interposed, and counsel is permitted informally to inquire of the members of the jury as to their qualifications, but, if this course should be objected to, the challenger would be compelled to state his challenge to

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the Court, and thereupon try it regularly. There can be no question but what the commissioners were entirely regular in demanding that the accused should state the grounds of his challenge in order that there might be an intelligent investigation into the proceeding. Another ground of complaint is that subdivision 10 of section 22 was violated. Subdivision 10 of section 22 reads as follows: "When the accused fails to appear or answer, testimony must be taken in the same manner as if he appeared and defended, and with even more technical accuracy, fullness and certainty; and, in such cases, some competent brother should be designated by the commissioners and required to appear for the accused, and to see that he have a fair and impartial trial." It will be seen that subdivision 10 applies only when the accused fails to appear or answer. In this case the accused did not fail to appear, but had appeared before the commissioners, and his failure was to appear upon the adjourned day. It is true he was not present at the trial, but there was not an entire failure to appear, and it seems that a fair construction of the section would be that in such cases the designation of a competent member to appear is a recommendation, which is not mandatory upon the commissioners. He might be designated to appear, but it is not clear that the section intended that the failure to designate should vitiate the trial; and whether or not the failure to designate was error was within the jurisdiction of the commission of appeals to finally decide. The next allegation of error is that hearsay evidence was introduced. The question at issue was whether the plaintiff had written and sent the letter. Direct evidence was given as to the letter being in the plaintiff's handwriting. It was directed

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to the grand master, and was in the hands of the officer of the Grand Lodge, the secretary, who was entitled to its custody, who testified that he had received it from the grand master, and that it was under his control as one of the papers belonging to his office. Hearsay evidence is not always incompetent, but is frequently allowed in trials in Courts of Record, and is evidence, so far as it goes, and, if not objected to, may, in the absence of other evidence, become conclusive upon the party. But there was no injustice in this, as upon this trial the plaintiff has stipulated and testified himself that he did write and mail the letter to the grand master. The objection is without merit, and a Court of Equity should not be influenced by it. As to the allegation that the punishment was too severe, that is a matter with which this Court has nothing to do. If the Court below had jurisdiction to try the plaintiff, it had jurisdiction to fix the punishment of expulsion. Whether it was commensurate with the crime, or whether it was excessive, this Court cannot decide. It will be seen that all of these alleged errors were, if error at all, of judgment, not affecting jurisdiction, and were reviewable by the commission of appeals, whose judgment was final, and not subject to review by the Court. It was a case wholly for the Masonic tribunal. Again, objection is made that all tribunals were subject to the direction, in some way or other, of the grand master, and that, therefore, upon the charge made against the plaintiff the grand master was disqualified. If this were so, it would be impossible for the order to try a person who desired to assail the grand master, and it would only be necessary for an offender to direct his offense against the grand master, and, however much deserv-

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ing of punishment, he would escape entirely by having made this selection of the object of his offense. I am unable to discover any grounds upon which this Court could interfere. When the plaintiff became a Mason he submitted himself to the government of the order as prescribed by its constitution and by-laws. Whatever right he obtained he obtained from the society itself. He held those rights subject to the laws of the governing body, and to no other. He was bound to conduct himself in accordance with the rules and laws of the society, and he knew that if he failed so to conduct himself, he was amenable to the court established by the organization itself. He was, at the time of committing the second offense, under discipline and suspension for a former offense against the laws of the order. It was in this action that the letter of the grand master, the reply to which was the subject of the trial now under investigation. That such letter was a gross violation of Masonic obligation, Masonic conduct and Masonic law, there can be no question. If I am correct in the views I have stated above, his trial was strictly in accordance with the rules of procedure established by the order, and his appeal to the commission of appeals, and the affirmance of its judgment by the Grand Lodge, was within the jurisdiction conferred by the rules of the order. There is no ground that I can discover upon which a Court of Equity should interfere to prevent the carrying out of the sentence as finally confirmed by the Grand Lodge. The complaint will be dismissed upon the merits.

When the Court will not interfere.—Where the controversy arises between members, the Court will be slow to interfere, so long as the government is fairly and honestly administered, and those who have grievances will be required, in the first instance, to

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resort to such remedies for redress as are provided by the rules of the association. *Lafond v. Deems*, 81 N. Y., 507.

Voluntary associations.—An exhaustive note collecting the authorities as to the status of a voluntary association and the relation of its members as to each other and third parties may be found. 4 Abb. N. C., 300.

CHARLES W. SLOAN, RESPONDENT AND APPELLANT, v. ANNA W. BAIRD, APPELLANT AND RESPONDENT.

NEW YORK COURT OF APPEALS, MARCH, 1900.

§§ 736, 737.

Unliquidated damages — Interest — Market value.

In an action to recover unliquidated damages for breach of contract for the sale of property, interest is not allowable unless there is an established market value of the property, or means were accessible to the party sought to be charged of ascertaining, by computation or otherwise, the damages which might be awarded.

Property may be said to have an established market value when other property of the same kind has been the subject of sale in the vicinity to so great an extent that the value has become fixed.

(Decided March, 1900.)

Cross appeal from a judgment of the Appellate Division, First Department, modifying and affirming a judgment entered upon the report of a Referee.

Julien T. Davies, for plaintiff.

Albert H. Atterbury, for defendant.

HAIGHT, J.—The defendant was the owner of certain lands, buildings and machinery at Trenton, New

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Jersey, known as the plant of the Hamilton Rubber Company. She entered into a certain contract with the plaintiff by which she agreed to sell and convey the property to him within a time specified for the sum of \$50,000. At the time specified the plaintiff tendered performance, but the defendant refused to convey the property to him; but, instead, conveyed it to one Skrim. This action was brought to recover the damages which the plaintiff sustained by reason of the defendant's refusal to perform her contract.

The case was tried before a Referee, who awarded the plaintiff \$15,500 damages, with interest thereon from the date of the breach of the agreement. The Appellate Division modified the judgment by deducting from the damages awarded by the Referee the sum of \$2,853.54, and also by deducting the sum of \$142.68 from the amount awarded as extra allowance in addition to costs, and, as so modified, the judgment was unanimously affirmed.

We have examined the exceptions raised by the defendant's appeal, and are of the opinion that the questions involved were properly disposed of by the Appellate Division. The only question which we shall here discuss arises upon the plaintiff's appeal, in which he claims that the Appellate Division improperly modified the judgment by deducting from the sum awarded the interest from the time of the breach of the contract.

It is true that much has been written upon the subject of awarding interest, and that the authorities are not in entire harmony. But we must regard the question here under consideration as settled by our recent decision in the case of *Gray v. Central R. R. of N. J.* (157 N. Y., 483). In that case the rule adopted by Earl, J., in *White v. Miller* (78 N. Y., 393),

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and by Bradley, J., in *Mansfield v. N. Y. C. & H. R. R. R.* (114 N. Y., 331), was approved and followed. The rule, as stated in these cases, is to the effect that in an action to recover unliquidated damages for a breach of a contract, interest is not allowable, unless there is an established market value of the property or means accessible to the party sought to be charged of ascertaining by computation, or otherwise, the amount to which the plaintiff is entitled (see, also, *MacMaster v. State*, 108 N. Y., 542). The damages in this case were the difference between the amount which the plaintiff agreed to pay and the value of the property. The property consisted of a parcel of land upon which there were several buildings inclosing a quantity of machinery used in the manufacture of rubber. The factory had been operated for a number of years, but at the time of the contract it stood idle and unsued. The property was of a special kind fitted for a peculiar business, and its value depended largely upon its location, condition and the demand for the goods which it was designed to manufacture. It appears that the machinery constituted the chief value of the property, and its long use of necessity produced a deterioration and impaired its value. The expert witnesses called upon the question of the value of the property widely differed in their judgment. With reference to the machinery, their estimates ranged from \$5,000 to \$48,000, and upon the whole property from \$35,000 to \$100,000. It is thus apparent that the damages sought to be recovered were not only unliquidated, but that no means were accessible to the defendant of ascertaining the amount which might be awarded by a jury and she called upon to pay. But it is said there was a market value. If so, what was it? Was it \$35,000 or

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\$100,000? The market value of property is established when other property of the same kind has been the subject of purchase or sale to so great an extent and in so many instances that the value becomes fixed. Bouvier, in his Law Dictionary, defines market value as a price established by public sales, or sales in the way of ordinary business, as of merchandise. The Century Dictionary defines market price as being the current price (see, also, *Murry v. Stanton*, 99 Mass., 345, 348). While evidence was given by experts showing the value of the property, there is no evidence showing that this property had a market value established and fixed by which the defendant could determine the damages which the plaintiff was entitled to recover or compute the interest thereon, and there is no finding by the Referee that the property had a market value.

The judgment should be affirmed, without costs to either party.

O'BRIEN, J. (dissenting).—The judgment in this case was entered upon the report of a Referee and awarded to the plaintiff damages for a breach by the defendant of an executory contract in writing whereby the defendant agreed to sell and convey to the plaintiff certain real estate at a specified price. The complaint alleges the due execution and delivery of the contract, the breach thereof by the defendant in refusing to convey upon tender of the purchase price, the sale by her to another party before the action was commenced, and the damages. The only fact alleged upon which the defendant in her answer took issue was the amount of the damages, and that was the only question which the Referee was required to determine. He found that the property

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which the defendant had agreed to sell to the plaintiff for \$35,000, subject to a mortgage of \$15,000, was worth at the date of the breach of the contract at least \$65,500, and that the damages amounted to \$15,500, with interest thereon from the date of the tender by the plaintiff of the purchase price. The Appellate Division, in affirming the judgment as to damages, held that the item of interest, amounting to \$2,853.54, was improperly allowed, and modified the judgment by striking it out of the recovery. Both parties have appealed to this Court, the defendant from the whole judgment and the plaintiff from that part of it which decides that interest was not allowable.

The defendant's appeal, therefore, rests upon the exceptions taken at the trial and the plaintiff's appeal upon the question of interest upon the damages from the date of the breach. The defendant having deprived the Court of the power to decree specific performance of the contract, was bound to respond to the plaintiff in such damages as were found to have been sustained by him in consequence of the breach resulting from the tender of performance and the refusal of the defendant to convey (*Cooley v. Lobdell*, 153 N. Y., 596), and the circumstance that the real property constituting the subject-matter of the contract was situated in another State presented no obstacle to the jurisdiction (*Newton v. Bronson*, 13 N. Y., 587; *Gardner v. Ogden*, 22 N. Y., 327; *Sutphen v. Fowler*, 9 Paige, 280; *Ward v. Arredondo*, Hopk., 213). Tender of the purchase price is generally regarded as equivalent to payment, and until conveyance made the vendor holds the title as trustee for the vendee (*Pelton v. W. F. Ins. Co.*, 77 N. Y., 605; *Hathaway v. Payne*, 34 id., 92; *Coggsell*

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v. Coggs, 2 Edw. Ch., 328). Upon tender of performance by the plaintiff and refusal of the defendant to convey, the damages for the breach of the contract is the difference between the contract price and the market value of the property at the time of the breach, and the vendee becomes then entitled to the rents and profits. *Worrall v. Munn*, 38 N. Y., 137; *Bostwick v. Beach*, 103 id., 414; s. c., 105 id., 661; *Margraf v. Muir*, 57 id., 155; *Pumpelly v. Phelps*, 40 id., 66.

The decision of the Referee upon the facts is conclusive upon this Court, and but two exceptions are relied upon by the learned counsel for the defendant to sustain her appeal. They were taken to a ruling of the Referee permitting two witnesses to express an opinion as to the value of the property, first, from their knowledge and observation of the property, and, again, upon a hypothetical question in the form usually propounded to experts on other subjects. The real estate which was the subject of the controversy was a rubber factory at Trenton, New Jersey. Neither of the witnesses resided there, but it appeared that they had seen the property, had heard the other testimony as to the cost of the land, the building and the tools and machinery, and were conversant in a very large way with the general business for which the plaintiff intended the property to be used and the cost of such plants. Both witnesses had large experience in the rubber business, and were familiar with the character and capacity of the various plants for producing the article throughout the country, but it did not appear that they had any knowledge of the local market for real estate at Trenton, where the plant in question was situated. Courts cannot ignore modern conditions of business

which affect the value of property. We know, for instance, that the value of a factory for the refinement or manufacture of sugar, oil, or even rubber, cannot be determined, with reference to the market for such property in the locality where situated. If values in such cases could be made to depend upon the wants of the local markets, much valuable property would be sacrificed, or, at least, underestimated. In many cases it would be found that there is practically no local market at all for real estate of this character. The particular location of this factory had very little to do with its value. That was dependent upon conditions entirely outside of the locality and growing out of the character of the business and the methods by which it is conducted. To an individual, or even a local corporation, the property might be worth very little, while one of the great corporations or combinations, by means of which business of this character is now conducted, would readily pay a fair price for it. It would, therefore, be unjust to limit the plaintiff's measure of damages to the nominal value in the market of Trenton, when it appears that it had a greater value in a much wider market. Since it appears that the business for which it was to be used is conducted by corporations outside of that city, operating throughout the country generally, or at least large sections of the country, the market in which the value was to be ascertained must be deemed to be co-extensive with the field of their operations. Therefore, whether these witnesses had qualified themselves to express an opinion, with reference to the value of the property in controversy, was a question of fact to be determined by the Referee in the first instance, and it is clear that the evidence justified his decision

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(*Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y., 56; *Nelson v. Sun Mut. Ins. Co.*, 71 id., 453; *Perkins v. Stickney*, 132 Mass., 218; *Spring v. Edgar*, 99 U. S., 658; *Mfg. Co. v. Phelps*, 130 id., 520; *Ry. Co. v. Warren*, 137 id., 353; *Coasting Co. v. Tolson*, 139 id., 559). There was evidence, with respect to the competency of the witnesses, and the decision of the Referee upon the question is not reviewable in this Court, not because the decision of the Court below was unanimous, but upon general and well-settled principles of law. The effect of a unanimous decision is limited to the facts in the case put in issue by the pleadings, and to the evidence to sustain such facts, and has no application to collateral questions arising at the trial, such as the qualifications of a witness to express an opinion or a juror to sit in the case. It follows that the defendant's appeal cannot be sustained.

It seems to me that the argument of the learned counsel for the plaintiff in support of his appeal from the decision below, on the question of interest, cannot be successfully answered. It would not be profitable, however, to discuss the question now upon principle or authority, since it has very recently occupied the attention of the Court (*Gray v. Central R. R. of N. J.*, 157 N. Y., 483). In that case it was admitted that a party was entitled to recover interest as part of the damages for breach of an executory contract for the sale of property when the property sold had a market value at the time of the breach, but, as the subject of the sale was an old ferryboat that had no market value, it was held that the action of the Court below in striking out the item of interest was proper. In the present case the Referee held that the property had a market value at the

time of the breach, and assessed the damages accordingly. I am unable to see how the Court can hold that the Referee committed an error of law in allowing interest on the damages from the date of the breach, since the facts found by him have not been disturbed by the Court below. The question of damages was the only issue in the case, and the only ground upon which this Court can deny interest to the plaintiff is that the defendant, when sued, could not ascertain how much she was bound to pay for her breach of the contract. The same answer is available to a defendant in every case, but whatever force it once had, it is clear that it has none now, since, by statute, a defendant, when sued upon such a claim, may serve with the answer an offer to liquidate the damages at a specified sum, and, unless the recovery is for a larger sum, he may not only defeat all claim for interest, but recover from the plaintiff the expenses incurred in defending on the question of damages against a claim for a larger measure of damages. Code, §§ 736, 737.

But quite apart from the fact that in every action against the vendor of real property for damages, arising from the breach of an executory contract of sale, it must be shown that the property has a market value exceeding the contract price in order to justify a finding of any damages whatever, the plaintiff's right to interest in this case rests upon other grounds still more difficult to answer.

When the plaintiff tendered the purchase price he had fully performed the contract, and, as we have seen, became in equity the owner of the property and entitled to the rents and profits, the defendant holding the legal title as his trustee. The conveyance by the defendant to a third party in violation of her

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agreement and of the trust, deprived the plaintiff of the rents and profits to which he was entitled, and the law will give him indemnity for this loss by awarding interest as a substitute (*Worrall v. Munn*, supra; *Bostwick v. Beach*, supra). The only inquiry involved in this feature of the case is whether the Referee committed any legal error in awarding interest to the plaintiff. I think it is difficult, if not impossible, to show that he did. If these views are correct, the judgment should be affirmed on the defendant's appeal, reversed on the plaintiff's appeal, and the judgment entered on the report of the Referee affirmed.

GRAY, LANDON, CULLEN and WERNER, JJ., concur with HAIGHT, J.; PARKER, Ch. J., votes for affirmance because he is unable to distinguish this case from that of *Gray v. C. R. R. of N. J.* (157 N. Y., 483); O'BRIEN, J., reads dissenting opinion.

Judgment affirmed.

Morris v. The Metropolitan Street Railway.

CHARLES B. MORRIS, AS ADMINISTRATOR, ETC.,
APPELLANT, v. THE METROPOLITAN STREET
RAILWAY, RESPONDENT.

SUPREME COURT, APPELLATE DIVISION, FIRST
DEPARTMENT, MAY, 1900.

§ 1294.

Judgment awarding nominal damages reversed — Action for negligence causing death of boy sixteen years of age.

Unless the findings be justified by the evidence, the Court is called upon to set it aside, applying thereto the same rules which the Court is authorized to apply in reviewing questions of fact.

The measure for the plaintiff's right of recovery is the pecuniary damages which he has sustained. In measuring this, however, the consideration is not limited to the benefit received prior to the death, but it should embrace all the probable, or even possible, benefits which might accrue from this life, modified by all the chances of failure and misfortune.

(Decided May, 1900.)

Appeal by the plaintiff from judgment awarding him damages against the defendant for six cents and from order denying motion for a new trial.

Edmund L. Mooney, for appellant.

Charles F. Brown, for respondent.

HATCH, J.—The only point involved upon this appeal is the question of the inadequacy of the damages which have been awarded by the jury. The action is brought by the father of the deceased, suing in a representative capacity, to recover damages on account of the negligence of the defendant in causing the death of his son. Upon the merits

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the jury found in favor of the plaintiff, and by their verdict assessed his damages at the sum of six cents. The plaintiff moved to set the verdict aside upon the ground, mainly, that the damages awarded were inadequate. The motion was denied, and from the judgment entered upon the verdict, and the order denying the motion for a new trial, the plaintiff appeals. No appeal was taken by the defendant.

It appeared upon the trial that the deceased was past 16 years of age at the time of his death, was five feet and eleven inches in height, and weighed 140 pounds—unusually large for a boy of his age. He was strong and healthy, very active, and very intelligent. He had been at school, but expected to graduate in the summer following his death, which occurred on the 9th of December, 1898. In the summer months, for five or six weeks during vacation time, he assisted his father in his business of dealing in grain and feed, and very often upon Saturdays, when there was no school; and he took his brother's place when he was off on a vacation. The boy received no compensation for this service, nor did he earn any money elsewhere. The plaintiff supported him, paid the expenses of his education and was not relying upon him at that time as furnishing a source of income. The plaintiff is in prosperous circumstances, and was in no present need of support from his son. The foregoing is, in substance, the evidence from which the jury were called upon to measure the pecuniary loss sustained.

It may be conceded that the extent of damages which may be awarded in cases of this character rests very largely with the jury. But the finding and the evidence upon which it is based are subject to the same scrutiny in review by this Court as upon

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any other question. Unless the finding be justified by the evidence, the Court is called upon to set it aside, applying thereto the same rules which the Court is authorized to apply in reviewing questions of fact (*Brown v. Foster*, 1 App. Div., 578; *O'Shea v. McLean*, 15 Civ. Proc. Rep., 69). Exercise of the power is not governed by any well-defined rule, but rests in the circumstances of the particular case. The measure of the plaintiff's right of recovery is the pecuniary damage which he has sustained. In measuring this, however, the consideration is not limited to the benefit received prior to the death, but it should embrace all the probable or even possible benefits which might accrue from this life, modified by all the chances of failure and misfortune. Among these is the probable or possible direct benefit from earnings during minority, and the legal duty of support of the parent owed by the infant in case of need after majority (*Birkett v. Knickerbocker Ice Co.*, 110 N. Y., 504); also his advice during life and the prospect of inheriting from him after death (*Benson v. Carlin*, 145 N. Y., 348). There are few cases in which special pecuniary damage can be shown. Especially is this true of infants of tender years. But such fact does not justify the Court in holding that no damage is shown, or in directing that nominal damages only can be awarded, as the right to recover is not only for present, but also for prospective loss (*Ihl v. Forty-second Street R. R.*, 47 N. Y., 317). It is the evident contemplation of the statute that every person is of some relative value to others (*Oldfield v. N. Y. & Harlem R. R.*, 14 N. Y., 310). Modern legislation in this regard, both constitutional and statutory, has emphasized the assumptions to be drawn from the

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enactment (*Medinger v. Brooklyn H. R. R.*, 6 App. Div., 42). While, as we have observed, each case is to be largely governed by its particular circumstances, yet we may consider, as bearing upon the question of the amount which ought to have been awarded, the recoveries which verdicts have established and which the Courts have upheld (*Johnson v. Long Island R. R.*, 80 Hun, 306; *aff'd* on appeal, 144 N. Y., 714). The authorities cited in the opinion in the last case — and they are but a tithe — show that in almost uniform course the award of damages for negligently causing the death of an infant has been of a substantial sum. Indeed, we look in vain to find any logical relation between the verdicts which have been rendered in this class of actions (and the reasons which the Courts have assigned for their support) and this verdict which awards nominal damages. It is quite true that we are not to apply strict rules of logic in sustaining or setting aside the verdicts of juries. Were we to do so, the whole administration of the law by this means would be thrown into the greatest confusion, if it did not entirely fail. Nevertheless, we may be reasonably sure, when we are confronted with a verdict which fails in logic when compared with others, and which upon a statement of it shocks the moral sense, that something about that verdict is so wrong that it ought not to be permitted to stand. This seems to be the status of this verdict. We think that the evidence in this case fairly shows that this life would have been of substantial pecuniary value to his father. Physically he was splendidly equipped; mentally he was strong and vigorous. The immediate time had arrived when the cost and expense which his father had bestowed upon him and borne

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gave great promise of return. It was this fact which the jury were to consider, and to which much weight has been attached by the Courts. Can it be possible that this prospect was worth no more than six cents? In addition, the father had a reasonable right to expect that he would be able to rely upon the advice which vigorous mentality is capable of giving, and that loss in this respect is of a distinct pecuniary character. Measured by all the surroundings, we think that the jury failed fairly to comprehend the elements of damage which the case necessarily presented, and that they erred in awarding nominal damages; for which reason this judgment should be set aside.

It was said, however, by the learned Court below that the evidence preponderated in favor of the defendant; and for that reason it declined to interfere with the verdict. If this law is to obtain, then it becomes the duty of the Court to set the verdict aside. We are also urged by the defendant to sustain the verdict for the reason that, upon the evidence, there can be no recovery, as the plaintiff failed to prove a cause of action. Such question is not fairly before us upon this appeal. The verdict of the jury in favor of the plaintiff has established his right to recover, and upon such question the plaintiff is concluded. The latter has not appealed from the judgment, and, unless it appeals, it presents no grievance for redress. It could only appeal when aggrieved (Code Civ. Proc., § 1294). It cannot be aggrieved by anything when it stands upon the judgment, and, choosing to stand upon it, it admits necessarily that the plaintiff was entitled to recover something. Therefore, every question in this respect must be resolved in favor of the plaintiff

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(*Carples v. N. Y. & Harlem R. R.*, 16 App. Div., 158). In this case the exceptions of the respondent were not properly before the Court, as they were not contained in the record; but they were also not before the Court, because no appeal from the judgment presented them. There is no conflict between this case and that of *Arnold v. Rothschild's Sons Co.* (23 App. Div., 221). In that case the verdict was for the defendant and the plaintiff appealed. The Court simply held that the judgment was right, for the reason that upon all the proof the complaint should have been dismissed. In the present case both parties stand upon the judgment; the appellant to the extent that it finds a cause of action in his favor, and the respondent to the extent to which a recovery has been had. And the fact of a recovery, as we have seen, is fatal to the respondent's position, as it assumes what it is precluded from questioning so long as it does not claim to be aggrieved by appealing therefrom. Indeed, in the sixth point of the respondent's brief is stated the correct rule: "All the exceptions relate to the exclusion of evidence upon the question of defendant's negligence, and, as the verdict of the jury established its negligence and the deceased's freedom from negligence, no prejudicial error can be based upon the exceptions." Of course, this is aimed at the plaintiff's claim of erroneous rulings; but, as it is fatal to the plaintiff, so far as it finds application, so, also, is it fatal to the defendant, so far as it seeks to apply a rule which would overthrow the effect of the judgment.

This judgment should, therefore, be reversed; the plaintiff to pay the costs and disbursements of the former trial.

All concur.

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Appeal — In what cases need not be taken.— When the judgment or order is void the party aggrieved need not appeal as prescribed. He may resist it on the ground of invalidity when steps are taken to enforce it (*Kamp v. Kamp*, 59 N. Y., 212), or by motion in the action. *Park v. Park*, 3 Law Rec., 204; S. C., 24 Misc., 372; S. C., 53 N. Y. Supp., 677.

Who may appeal.— A party in whose favor a judgment is entered or an order made cannot be aggrieved by it, and he is, therefore, in no position to claim the right of appeal (*Hooper v. Beecher*, 109 N. Y., 609). But the right to appeal by this section is absolute (*Sperling v. Bull*, 26 App. Div., 64). Although a second appeal cannot be taken without leave where the dismissal does not affect the merits (see *Sperling v. Bull*, supra). The right to appeal, however, applies only to "a party aggrieved." *Matter of Griscom, Jr.*, 28 App. Div., 72.

IN THE MATTER OF THE PROBATE OF THE LAST WILL
AND TESTAMENT OF ISABELLA ANDREWS,
DECEASED.

NEW YORK COURT OF APPEALS, FEBRUARY, 1900.

Legal formalities of will — Signing at the end.

The intention of a testator cannot be considered in determining whether he has complied with the formalities prescribed by the Statute of Wills in executing the instrument.

The requirement that the will shall be subscribed at the end thereof by the testator is not complied with by his signing on the second page of an instrument covering the first three pages of a sheet, folded at the back so as to make two leaves, and marking at the top of page three, "2d page," and of page two, containing the signature and attestation clause, "3d page." (*Decided February, 1900.*)

Appeal from an order of the Appellate Division, Second Department, affirming a decree of the Surrogate of the county of Kings denying probate to an instrument propounded as the will of Isabella Andrews, deceased.

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George G. Reynolds and Armour C. Anderson, for appellants.

Frederic W. Adce, for respondents.

BARTLETT, J.—This case comes before us under circumstances so unusual that few words of comment may not be out of place.

The Surrogate of Kings county refused probate to the will we are about to consider, on the ground that it was not subscribed at the end thereof, as required by the Statute of Wills (2 R. S., 63, § 40; 2 Banks' 9th ed., p. 1877). In so doing, he followed the settled law of this Court for years, and many well-reasoned English cases, when construing a statute similar to our own. 1 Vict., ch. 26.

The learned Appellate Division affirmed the Surrogate's decree with a divided Court, giving utterance at the same time to a protest both emphatic and unanimous.

The opinion states that the conclusion reached was solely under the stress of authority, and that, unaided by the light of judicial decisions, a contrary result would have followed. One of the dissenting Justices stated that while he recognized the principle of stare decisis, cases sometimes arise when a Judge is justified in refusing to follow a decision of the Court of last resort. The other dissenting Justice wrote an opinion in which he succeeded in reaching the conclusion that neither the Statute of Wills nor the cases which had compelled the majority of his bretheren to reluctantly affirm the Surrogate's decree, called for any such result.

As the opinion of the Appellate Division concedes that the question presented is not an open one in this

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Court, we might well content ourselves with an affirmance of the judgment, did we not feel constrained by judicial courtesy to re-examine the legal situation that has been so pointedly called to our attention.

It has long been the settled policy of this State to require certain formalities to be observed in the execution of wills; their provisions are exceedingly simple, and calculated to prevent frauds and uncertainty in the testamentary disposition of property. *Matter of O'Neil*, 91 N. Y., 520; *Willis v. Lowe*, 5 Notes on Cases, 428.

Section 40 (2 R. S., 63; 2 Banks' 9th ed., p. 1877) reads as follows: "Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner: 1. It shall be subscribed by the testator at the end of the will. 2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses. 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament. 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator."

These are the only restrictions imposed upon a testator when executing his will, and they appear to be wise, reasonable and easily understood.

It has been repeatedly laid down as the rule in this State, that the intention of the testator is not to be considered when construing this statute, but that of the Legislature. The question is not what did the

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testator intend to do, but what has he done in the light of the statute.

It is undoubtedly true that from time to time an honest attempt to execute a last will and testament is defeated by failure to observe some one or more of the statutory requirements.

It is better this should happen under a proper construction of the statute than that the individual case should be permitted to weaken those provisions calculated to protect testators generally from fraudulent alterations of their wills.

It may be well, before examining the will which is the subject of this appeal, to refer to a few of the cases which construe the provision of the statute requiring the testator and the witnesses to subscribe at the end of the will.

In *Sisters of Charity v. Kelly* (67 N. Y., 409), it was held that the provision of the statute requiring the testator to subscribe "at the end of the will," means the end of the instrument as a completed whole, and where the name is written in the body of the instrument, with any material portion following the signature, it is not properly subscribed, nor can it be claimed that the portion preceding the signature is valid as a will.

In *Matter of O'Neil* (91 N. Y., 516) a printed blank was used and the formal commencement was printed on the first page and the formal termination printed at the foot of the third page. The entire blank space was filled with writing, and apparently for want of room a portion of a paragraph containing material provisions was carried over to and the paragraph finished at the top of the fourth page; the two portions were not, however, sought to be connected by means of a reference or anything indicating their re-

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lation to each other. The name of the testator was written at the end of the printed form and the names of the witnesses written below the formal attestation clause on the third page. This Court held that there was no legal subscription of the will and affirmed the judgment denying probate.

Chief Judge Ruger, who wrote the opinion of the Court, said: "While the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case Courts do not consider the intention of the testator, but that of the Legislature.

* * * The statute fixes an inflexible rule by which to determine the proper execution of all testamentary instruments. * * *

"It will be seen in all of the cases cited there was no reason to doubt the testator's intention to make a valid disposition of his property, and yet in each case the will was denied probate, because, in the execution thereof, the testator did not conform to the provisions of the statute, in failing to place his signature at the physical end of the will."

In the Matter of Conway (124 N. Y., 455) a blank form was used, the whole of which was upon one side of the paper. A space was left for the dispositions to be made, preceded by the words, "I give, devise and bequeath my property as follows." The blank space was filled up by three complete devises; at the end of the last was underlined, in parentheses, the words, "carried to back of will." Upon the back of the sheet was written the word "continued;" following it were various bequests and then the words, "signature on face of the will." The signature of the

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testator appeared at the end of the testimonium clause on the face of the paper and those of the witnesses under the attestation clause. It was held by the Second Division of this Court that there was not such a subscription and signing by the testator as required by the statute, and that the will had been improperly admitted to probate.

Judge Parker, in delivering the opinion of the Court, said: "The aim of the statute is to prevent fraud; to surround testamentary dispositions with such safeguards as will protect them from alteration."

The learned Judge also declared, in substance, that the admitted intention of the testator that the provisions appearing on the page following his signature should form a part of his will, would in no way affect the question before the court.

In *Matter of Whitney* (153 N. Y., 259), it was held that a will drawn upon a printed blank covering only one page, and signed by the testator and subscribing witnesses at the foot of the page, is not subscribed by the testator at the end of the will as required by the statute, when the blank space in the printed form is filled up by subdivisions marked, respectively, "First" and "Second," followed by the words, "See annexed sheet," and additional subdivisions marked, respectively, "Third" and "Fourth," are written on a separate piece of paper attached to the face of the blank, immediately over the first and second subdivisions, by removable metal staples. It was held that the question presented was not an open one in this Court, and that the will was not legally subscribed.

The Court again approved the doctrine that the existence of good faith did not affect the question

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pending, as the intention of the Legislature, and not that of the testator, governed.

In *Matter of Blair*, reported in 84 Hun, 581, this Court affirmed the judgment of the General Term, First Department, on the opinion below, which reversed a decree of the Surrogate's Court admitting the will to probate. This instrument consisted of eight pages. The testator signed at the bottom of the seventh page, and the witnesses signed at the end of a proper witnessing clause at the top of the eighth page. After the place for the signatures of the witnesses, but before they were actually signed or the will executed, a clause was added directing the executor to sell at private sale a certain piece of real estate, and to devote the proceeds of sale to liquidating any deficiency in interest or cash bequests under the will. The will was then executed, as before stated, and the testator signed the added clause, but the witnesses did not. 152 N. Y., 645.

In each of the cases cited it was very clear that the will was not legally subscribed, and that to have admitted it to probate by yielding to the suggestion that it was an honest attempt to make a will, would have been a practical repeal of the statute as to subscription at the end of the instrument.

Our present Statute of Wills, requiring that a will should be subscribed at the end thereof, is similar to 1 Victoria, chap. 26, which was in force in England from 1837 until 1853, when it was amended by 15 and 16 Victoria, chap. 24, known as "Lord St. Leonard's Act." Prior to this amendment the English Courts construed the act as strictly as our own have the present Statute of Wills (*Willis v. Lowe*, 5 Notes of Cases, 428; *In re Parslow*, id., 112; *In re Tookey*, id., 386; *Ayres v. Ayres*, id., 375; *Sweetland v. Sweet-*

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land, 4 Swabey & Tristram, 6; *Smee v. Bryer*, 6 Moore's P. C. Cases, 404). In the latter case Lord Langdale, delivering the opinion of the Court, said, at page 410: "It may happen, even frequently, that genuine wills, namely, wills truly expressing the intentions of the testators, are made without observation of the required forms, and whenever that happens, the genuine intention is frustrated by the act of the Legislature, of which the general object is to give effect to the intention. The Courts must consider that the Legislature, having regard to all probable circumstances, has thought it best, and has, therefore, determined to run the risk of frustrating the intention sometimes, in preference to the risk of giving effect to, or facilitating, the formation of spurious wills, by the absence of forms. It is supposed, and that authoritatively, that the evil of defeating the intention in some cases, by requiring forms, is less than the evil probably to arise by giving validity to wills made without any form in all cases."

The reasoning of our own and the English Courts find support in two States where the Statute of Wills is substantially the same as in New York (*Hays v. Hardin*, 6 Penn. St., 409; *Glancy v. Glancy*, 17 Ohio, 134).

We come, then, in view of the law as it now stands, to the will before us.

The testatrix was an unmarried woman, aged about sixty years; she left her surviving no nearer relatives than first and second cousins; no part of her estate is given to any relative; a stranger to her blood is sole executor; the will is in his handwriting, and the proceeds of sale of testatrix's house and lot in Brooklyn are given one-half to him and one-half divided equally between two religious societies. In

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addition to this the testatrix gave eight money bequests, four to religious societies and a cemetery and the others to persons not of her blood. These bequests aggregate about \$4,200.

The residuary clause is as follows: "The rest, residue and remainder of my estate I give unto my executor, to make disposition of and divide in such manner as he, in his judgment, may deem best and proper."

No undue influence is charged.

The estate is estimated at about \$15,000. The will was drawn on a printed blank, being one piece of paper, consisting of a sheet of four pages, the two leaves of which were joined from top to bottom on the left side.

The formal opening part of the will is printed on the top of the first page, leaving the rest of that page blank; the closing part, containing the clause for the appointment of the executor, and that which follows, including the attestation clause, was printed on the top of the second page of the first leaf, leaving the rest of that page and both pages of the second leaf blank. The draftsman filled the blank on the first page and then turned to the first page of the second leaf, being the third page of the blank, and filled that, marking it at the top "2d page." He then turned to the second page of the first leaf, containing the closing part of the will, as before stated, in print, marked it at the top "3d page," and completed the instrument, save as to its execution, by filling the blanks at the top of that page, except the blank for the date, which was left to be filled in at the time of execution.

It is to be observed that a complete will was made out on the two sides of the first leaf, being the first

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and second pages of the blank; all of the first side of the second leaf, marked "2d page" could have been written after execution, as no sentence thereof is continued from the first page of the will, nor carried over to the alleged third page thereof. The fourth page of the blank could have been written over in the same way.

The first page of the will contains the money legacies, the direction to sell the real estate and divide the proceeds and two legacies of personal property.

The alleged second page of the will contains bequests of personal property and the residuary clause.

We have here on one entire piece of paper, folded so as to make four pages, a complete will, so far as form goes, on the first and second pages, and then follows on the third page of the blank and after the signatures of testatrix and witnesses on the second page of the blank a page marked "2d page," not connected with the will proper in any way, but complete by itself.

The question is not whether from the proofs in this case the page following the signatures of the will is in fact a part of testatrix's will by reason of her established intention, but is the instrument, so drawn, subscribed at the end thereof as the statute commands.

We are of opinion that it is not legally subscribed, and that to hold otherwise would open the door to gross fraud and be contrary to the statute and the settled law.

It was suggested on the argument of this case that the effect of the Statute of Wills, as strictly construed by this Court, is to defeat the intention of many testators, while the fraudulent addition to wills was a crime of rare occurrence.

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The fallacy of this argument consists in overlooking the fact that the number of frauds prevented by our wise and simple statute can never be known.

We might as well ask how many commercial crimes have been prevented by the Statute of Frauds.

The case at bar is one of the strongest illustrations of the wisdom of the Statute of Wills that has ever come to the attention of this court.

With a complete will on the first and second pages of a blank containing four pages, there is nothing to prevent filling up the vacant third and fourth pages with any number of additional provisions, including, as in this case, a residuary clause allowing an executor to dispose of the residue in such manner as he deemed proper.

The defeat of testamentary intention in a few cases is not due to the statute or the construction of it by the courts, but to the fact that scriveners and other laymen, ignorant of the simple and clear provisions of the statute, are permitted to draw wills.

It is urged with much ability, by the learned senior counsel for the appellants, that the alleged second page of this will can be read into it by invoking the doctrine of incorporation as established in England, and, to some extent, in this State.

We are of opinion that, under the facts here disclosed that doctrine has no application; if it were otherwise, the evasion of the statute would be so easily accomplished as to render its repeal unnecessary.

We have to say in conclusion that it is quite possible we have given to this appeal undue importance, involving, as it does, a question of law settled in this court, but we desire to express in the most emphatic

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manner our approval of the Statute of Wills as now construed.

The order appealed from should be affirmed, with costs.

PARKER, Ch. J.; GRAY, O'BRIEN, HAIGHT, MARTIN and VANN, JJ., concur.

Order affirmed.

WILLIAM C. LESSTER, RESPONDENT, v. THE
LAWYERS' SURETY CO., APPELLANT.

SUPREME COURT, APPELLATE DIVISION, FIRST DE-
PARTMENT, APRIL, 1900.

§ 1344.

Action on receiver's bond — Payment of money by receiver in good faith under order of Court subsequently reversed.

Where a receiver has paid over money under an order of the Court, he may be permitted to make proof of that fact in answer to any charge of apparent disobedience to the order of an Appellate Court reversing the order under which the payment was made and directing payment to be made to another party.

The reversed order is a protection to the receiver if the payment was made in good faith, no stay having been obtained; and where, in an action upon the receiver's bond, there is evidence tending to show that the payment was not made in good faith, and there is also evidence to the contrary, the defendant is entitled to have the question of good faith submitted to the jury.

Held, that plaintiff is entitled to recover costs in the Court of Appeals, in the proceeding in which the appeal was taken, the judgment entered at Special Term upon the remittitur of the Court of Appeals granting costs not having been appealed from.

(Decided April, 1900.)

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Appeal by leave from determination of the Appellate Term, affirming order of General Term of City Court sustaining judgment of that court entered on a verdict for the plaintiff.

Carlisle Norwood, for appellant.

J. Baldwin Hands, for respondent.

RUMSEY, J.—On the 15th of February, 1897, Mr. D. Phoenix Ingraham was appointed receiver of the rents, issues and profits of premises described in the complaint in an action in which Mary Harris was plaintiff and Lesster, the plaintiff here, a defendant. The order appointing him required him to receive the rents and profits and dispose of the same pursuant to the order of the court. Mr. Ingraham, as principal, and the Lawyers' Surety, as surety, executed a bond in the penalty of \$1,000, conditioned "that if the said D. Phoenix Ingraham shall faithfully discharge the duties of his trust as such receiver, then this obligation shall be void, otherwise to be in full force and effect." Upon the settlement of the accounts of the receiver, it was found that there was in his hands for distribution the sum of \$883.71, out of which balance \$141.25 was paid for referee's and stenographer's fees. Lesster made a motion that the balance in the receiver's hands be paid over to him, and that motion was denied. Mary Harris, the plaintiff in the original action, also made a motion that there be paid over to her the amount found due her on the deficiency judgment. Upon that motion an order was entered requiring the receiver to pay the sum of \$114.25 as commissions, \$10 for the premium accruing on his bond subsequent to the rendering of his accounts, and \$578.82 to Mrs. Harris, and the re-

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mainder being \$39.12 to the chamberlain of the city of New York to the credit of the action. That order was entered on the 5th of July, 1898. A copy of it was served on the receiver on the same day, and a demand made for the payment to Mrs. Harris of the amount due her under the deficiency judgment pursuant to the order. On the 6th of July, in pursuance of that demand, there was paid to Mrs. Harris the sum of \$578.82, and the other payments were made as required by the order, so that the receiver paid out all the moneys in his hands in pursuance of the order of the court. The motion for that order was made upon notice to Lesster on the 20th of June, 1898. Lesster appeared upon the hearing and opposed it. The decision of the motion was handed down on the 1st of July, was published in the Law Journal on the 2d, and the order was entered on the 5th. The order was served upon Lesster's attorney on the 7th. Whether he had notice at the time of such service that the payments had been made does not appear, but on that day the attorney for the plaintiff (Mrs. Harris) received a letter stating that an appeal would be taken. The appeal was taken on the 4th of August. So far as appears no steps were taken by Lesster to stay proceedings upon the order. The appeal was heard in the Appellate Division upon the same papers on which the motion was made in the Special Term. It did not appear in those papers that the money had been paid over to the plaintiff in pursuance of the order, and no suggestion to that effect was made at the argument.

The appeals from those orders were argued together. In the month of December, 1898, an order was made by this court reversing the two orders and directing that the receiver pay out of the fund in his

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hands \$773.98 to Lesster. That order was subsequently served upon the receiver with a demand for the payment, which was not complied with. After Ingraham had made the payments under and pursuant to the Special Term order, an order was made discharging the receiver and canceling his bond. That order was afterwards vacated upon motion.

The receiver appealed to the Court of Appeals from so much of the order of the Appellate Division as reversed the order of the Special Term directing the payment to the plaintiff in that action, and also from so much of the order as directed the referee to pay to Lesster the sum of \$773.98. The appeal was dismissed, with costs, by the Court of Appeals, and the usual order was made at Special Term upon the remittitur that the order of the Court of Appeals be made the judgment of this court, and that the appeal be dismissed, with costs. Upon the filing of that remittitur the attorney for Lesster taxed two bills of costs — one against Mary Harris for \$115.10 and one against the receiver for \$92.70 — and judgment was entered against those persons respectively dismissing the appeals from the orders, with costs, in favor of the respondent, Lesster, against the receiver for \$92.70 and against Mary Harris for \$115.10. The larger bill was paid, but the receiver's bill was not.

Upon the appeal to the Court of Appeals the defendant here gave the usual undertaking on appeal. Proper steps were taken to charge the defendant with liability for the bill of costs against Ingraham. The present action was brought in the City Court to recover from the surety the sum of \$773.98, with interest from the 17th of June, 1898, on the receiver's bond, upon the allegation that there had been a breach thereof by the refusal to pay over to Lesster

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the sum ordered to be paid by the Appellate Division. By a second cause of action the plaintiff sought to recover the amount of his costs in the Court of Appeals, which were awarded against the receiver. The judgment recovered by the plaintiff in the City Court was affirmed by the Special Term, and upon appeal to the Appellate Term the judgment was also affirmed, but leave was given to appeal to this court. The appeal was accordingly taken pursuant to the leave thus given.

The respondent makes the preliminary objection that the appeal to this court has not been allowed, as required by the Code of Civil Procedure. Such an appeal as this can only be taken to the Appellate Division when the judges of the Appellate Term permit it, and then it is taken, not from the judgment that was before them, but from the determination which they have made (Code of Civil Procedure, § 1344). Whether there shall be an appeal is entirely in the discretion of the Court making the determination. There is no dispute that the court at the time it made the determination gave leave for this appeal. It was competent for it to do so on the papers upon which its determination was made, if in its judgment a proper case existed, and when it was determined that a proper case does exist and has expressed that determination by an order permitting an appeal, the appellant is at liberty to come to this court. The case is, therefore, regularly before us.

The condition of the defendant's bond as surety was that, if the receiver should faithfully discharge his duties as such receiver, then the bond should be void. It is claimed by the plaintiff that the surety by executing this bond made himself privy to any order which should be made by the court directed to

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the receiver in respect to his duties; and that, whenever it was made to appear that the receiver had failed to obey an order of the court, the condition of the bond was violated and the defendant became liable on it. This would be technically the case if the condition of the surety's bond provided in terms that the receiver should obey all orders of the court and should pay as directed by the court, or if there were any other express condition in the bond from which it might be inferred that the surety originally covenanted that the receiver should do the particular thing the court ordered him to do. Whenever such a bond has been made, as where one has given security for an administrator or an executor, by the terms of which he has bound himself that the administrator will obey the orders of the Surrogate, it has been held such an order properly made is conclusive upon the surety, and when the failure to obey the order is established the liability of the surety is absolutely fixed. But those cases turn upon the express agreement of the surety that the administrator will obey the orders of the Surrogate, and when such a contract has been made the courts say that by his contract the surety puts himself in privity with the administrator with respect to the decrees of the Surrogate. But unless the contract contains some provision from which it can clearly be inferred that the surety has come in privity with the principal so that he has bound himself to abide by the judgment against the principals, such an order is not conclusive against him and he may question it when a liability is sought to be established against him on account of it (*Thompson v. McGregor*, 81 N. Y., 592; *Douglass v. Howland*, 24 Wend., 35). While the order of the court was evidence against this surety,

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the defendant was, nevertheless, at liberty to show, not that the order of the court was improper, but that the apparent disobedience to it was not in fact a disobedience at all, for the reason that the receiver had before that time faithfully discharged his duties as such, by paying over all the moneys in his hands in pursuance of another valid order of the court. It is to be noticed that the order, said to be disobeyed, required the payment by the receiver "out of the moneys collected by him as such receiver." That order was entered on the 19th of December, 1898. It was made on the appeal from the Special Term order, and of course there were before the court the same papers which were before the Special Term when the original application was made to it, and no others.

When the order of the Appellate Division was made, that court was not informed that the receiver had already paid over the whole of the moneys collected by him, "as such," in obedience to the order which that court was then reviewing. As to that matter, the receiver never had an opportunity to make proof before any court, respecting that order. For that reason, he (as was suggested at the time of the settlement of the Appellate Division order) might have been relieved from the effect of it, upon a proper motion, had he seen fit to make one, and for the reason that the order was made without knowledge by the Court of a very material fact. If, after the making of that order and the demand upon the receiver for payment under it, a motion had been made to punish him for its disobedience, it is quite likely that he would have been permitted to exculpate himself by showing that, so far from disobeying the order of the Court, he had already paid over the

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identical fund in compliance with a prior valid order. It is quite true that usually, when an order has been made requiring the payment of money, the person against whom it is directed is not at liberty, upon the motion to punish him for contempt for disobedience, to show that he had no money in his hands out of which to make the payment — but that rule applies because ordinarily, when such an order is made, the Court, in making it, determined not only that the person against whom it is made ought to pay the money in a particular way, but that he has the money with which to pay. Where, however, as in this case, he has been compelled to pay money by an order of the Court during the pendency of the appeal, and he has not had an opportunity to show that fact, there clearly is no injustice in permitting him to make proof of that fact in answer to any charge of apparent disobedience to the order. If the receiver would have this privilege, much more should an opportunity be given to the surety to show that the receiver had in fact faithfully discharged his duties by obeying a valid order of the Court, and thereby denuding himself of the fund out of which the payment was ordered.

The order of the Court at Special Term was entered on the 5th day of July, 1898. It was an absolute requirement to this receiver to pay over the money in his hands in a proper way. A demand was made for the money on the very day the order was entered, and he paid the money in pursuance of that order on the next day. There can be no doubt that if that payment was made in good faith the order was at that time a full protection to the receiver. He had no possible excuse for refusing to obey it, and, if he had refused, the Court might,

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and would undoubtedly, have punished him for contempt in so acting. The order stood in full force and no appeal had been taken, and even if an appeal had been taken, it would have made no difference with the duty of the receiver in that regard, for the obligation to pay continued until something occurred to relieve him of it. The order of the Special Term was just as binding as though it had been made by the Appellate Division. Not only was the receiver bound to pay, but he was not at liberty to question it, because he held the money only to pay over when the Court directed him and such was his absolute duty. When the order was reversed, it lost its force, but it did not cease to be protection to the receiver for whatever had been done under it while it stood. The mere reversing of an order because it is erroneous, does not make one who has acted pursuant to it a wrongdoer, even though the effect of the reversal is to require the person who has received the benefit of it to make restitution, if the Court sees fit to require him to do so (*Lovett v. The German Reformed Church*, 11 Barb., 67-83; *Simpson v. Hornbeck*, 3 Lansing, 53; *Langley v. Warner*, 3 N. Y., 327). Whether a receiver, being the mere hand of the Court, could, without leave or direction of the Court, move for such restitution, is not clear nor particularly important. It is quite clear, however, that *Lesster* could have done so. He acquired no right to take away from the receiver the protection the Court had given him, although he might apply to the Court for an order requiring the person who received the money to make restitution, and, if he did so apply, the Court would have ordered it to be done. That right he still has. So far as the payment under the Special Term order is concerned, then, it

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must be held that at the time it was made the order was a perfect protection to the receiver, if he made the payment in good faith, and the plaintiff here is not in a situation to deprive the receiver of such protection unless he shows that the receiver made the payment, not in good faith, but in collusion with the person to whom it was made. If it can be said that the plaintiff gave any evidence tending to show that the payment was so made, it is quite clear that there was evidence to the contrary, and, therefore, when that question became material the defendant was entitled to have it submitted to the jury as requested. His exception to the refusal to submit it to the jury was well taken, and the judgment for that reason should be reversed and a new trial ordered. A jury should say whether the payment to Mrs. Harris was made in good faith and without intention to forestall the action of the Court or to deprive Lesster of the benefit of any subsequent order.

So far as the costs in the Court of Appeals are concerned, there can be no doubt that the plaintiff is entitled to recover them. When a judgment was entered upon the remittitur of the Court of Appeals, giving to the plaintiff a bill of costs against the appellant, that operates as a construction of the order of the Court of Appeals and it became binding upon all the parties and cannot be reviewed in this collateral way. By entering that judgment, the Court at Special Term construed the order of the Court of Appeals as giving to the plaintiff a bill of costs against each appellant. That construction was not appealed from and it is binding, but for the error with respect to the first cause of action the judgment appealed from must be reversed and a new

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trial ordered, with costs to the appellant to abide the event.

BARRETT and PATTERSON, JJ., concur; VAN BRUNT, P. J., and McLAUGHLIN, J., dissent.

PEOPLE EX REL. AMERICAN THREAD CO. v.
FEITNER ET AL., AS COMMISSIONERS OF TAXES OF
THE CITY OF NEW YORK.

SUPREME COURT, NEW YORK COUNTY, SPECIAL
TERM, APRIL, 1900.

§§ 2120 to 2144.

Certiorari to review action of the tax board — Jurisdiction — Foreign corporation — Issuance of writ — Void assessment — What petition must contain.

It seems a writ of certiorari will seldom be allowed to review a void assessment.

Apparently, as the law now stands, a party assessed in the city of New York may resort, as a matter of right, to either the statutory writ or to the common-law writ as regulated by sections 2120-2144 of the Code of Civil Procedure.

The requirement in the Tax Law, that the petition for the writ must contain a statement that "application has been made in due time to the proper officers to correct such assessment," was intended by the Legislature that such statement should be inserted in the petition only in cases where the assessment is sought to be reviewed on some other ground than that it is "illegal," as that word is used in the statute.

(Decided April, 1900.)

Paul Armitage, attorney for relator.

John Whalen, of counsel for respondents.

BEEKMAN, J.—The relator having been assessed by the respondents for purposes of taxation for the

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year 1899, has sued out a writ of certiorari to review the action of the board, on the ground that the latter had no jurisdiction to make the assessment, because the relator is a foreign corporation, neither doing business in the State nor having any property therein. A motion is now made by the respondents to quash the writ on the ground, as stated in the notice of motion, "that the court was without jurisdiction to issue said writ, and that the said writ was inadvertently issued." It is admitted, for the purposes of the motion, at least, that the assessment complained of is null and void for the reasons above stated, so that the only question which is presented to the Court is whether, under such circumstances, the writ was properly issued. The first contention advanced by the counsel for the respondents is that certiorari will not lie to review a void assessment. This, however, is no longer an open question, the Appellate Division having expressly decided the contrary (*People ex rel. Powder Co. v. Feitner*, 41 App. Div., 544). It is there said (p. 547): "In the case now before us the assessment was made by properly constituted legal authorities. The assessment was illegal because the relator was not subject to assessment for the purposes of taxation, or to taxation, in the city and county of New York. In that sense the assessment against it was void, and it was illegal in consequence. There is nothing in section 250 nor in any other provisions of the General Tax Law which would limit the effect of the word 'illegal,' as applied to an assessment such as this against the relator, and in none of the cases that have been cited or examined has it been declared as an absolute rule that in no case of a void assessment will a writ of certiorari be allowed. The farthest that the

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Courts have gone is to say that a writ of certiorari will seldom be allowed to review a void assessment." The next contention advanced in support of the motion is that the writ was inadvertently granted, which is assumed to mean that the power of the Court was improvidently exercised. This proceeds upon the theory that the case at bar is not one which presents such exceptional features as to call for the exercise of discretion in favor of the issuing of the writ. The answer to this is plain. In the first place, if the writ was applied for under article 11 of the Tax Law, sections 250-256, it was the duty of the Court to grant it (*Matter of Corwin*, 135 N. Y., 245, 249). In the second place, if the writ might be regarded as a common-law writ, and it seems that the statutory writ provided for in the Tax Law is not exclusive of the other (*People ex rel. Powder Co. v. Feltner*, *supra*), the answer is that for more than forty years the right to a certiorari to review assessments for purposes of taxation in the city of New York has been repeatedly declared and conferred by statute (chap. 677, Laws of 1857, § 24; chap. 302, Laws of 1859, § 20; chap. 410, Laws of 1882, § 821; chap. 311, Laws of 1885, § 2; chap. 378, Laws of 1897, § 906 — Greater N. Y. Charter). In the case of each of these statutes the issuing of the writ is, in terms, mandatory upon the Court. Prior to 1885 the purpose of the writ was declared to be "to review or correct on the merits" any decision or action of the tax commissioners. By the above cited act of that year, the grounds for review were stated to be illegality or error by reason of overvaluation, and by chapter 378, Laws of 1897, section 906, the function of the writ was expanded so as to include cases of inequality in the assessment of real property. In

none of these statutory provisions is there any reference to the particular kind of writ of certiorari, whether statutory or at common law, which should be resorted to. Indeed, prior to the passage of chapter 269, Laws of 1880, now embodied in the sections of the Tax Law above cited, the only writ which could issue in such cases was the common-law writ. It follows that if, as seems to have been decided, the Court has power to issue either form of writ to review an assessment on the ground of illegality, which includes an assessment void for want of jurisdiction in the assessors to make it, the mandatory provisions of the city charter requiring a writ of certiorari to issue for the purposes of such a review are as applicable to one form of the writ as to the other. Apparently, as the law now stands, a party assessed in the city of New York may resort, as a matter of right, to either the statutory writ or to the common-law writ as regulated by sections 2120-2144 of the Code of Civil Procedure. It is true that section 2127 of the Code provides that the granting or refusal of the writ is discretionary with the Court, but this is necessarily qualified, as is the case here, by other statutory provisions declaring in special cases that the writ must be issued. The remaining point made by the counsel for the respondents is, perhaps, more difficult of solution. Under the sections of the Tax Law, above mentioned, it is required that the petition for the writ must contain a statement that "application has been made in due time to the proper officers to correct such assessment." This provision is a new one and was not contained in chapter 269, Laws of 1880. The petition in the case at bar does not contain any such statement. Indeed, it appears from the papers that the relator was en-

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tirely unaware that it had been assessed until after the time had passed for making any objections before the tax commissioners. As the relator has taken a writ returnable at Special Term, in conformity with the Tax Law, and not to the Court for hearing at the Appellate Division, as the Code requires where the common-law writ is applied for, the writ must be regarded as the statutory one, and it, therefore, becomes necessary to consider whether the omission of the statement above referred to is fatal to this proceeding. It was doubtless the general rule, prior to any legislation on the subject, that no relief would be granted under the writ if the party aggrieved had failed to present his objections to the assessors within the time provided by law for that purpose. A distinction, however, in this regard seems to have been drawn between cases where the assessment was merely erroneous and those where it was void for lack of jurisdiction (*People ex rel. Paddock v. Lewis*, 55 Hun, 521; *People ex rel. West Shore R. R. v. Adams*, 125 N. Y., 471, 484). In the *Paddock* case the question is quite elaborately reviewed, and the conclusion of the Court was that "a party outside of the jurisdiction was under no obligation to appear before the assessors, and he cannot be presumed to know that an illegal tax is about to be assessed against him." In the *West Shore* case the Court, while holding that the failure of the relator to apply to the assessors for the correction of the assessment complained of, within the time allowed by law for that purpose, was fatal to the writ, states at the same time that the case was rather one "of over-assessment than of a void assessment, as to which possibly a different rule would apply." The distinction certainly seems to be a reasonable one and has

support in authority. In the one case the assessors, having jurisdiction, have made a valid assessment, but one which is open to correction; in the other case there is in the eye of the law no assessment at all, but only an attempt to make one which is at all times open to challenge on the ground of its invalidity. It would be a clear misuse of language to speak of "correcting" such an assessment. There is but one remedy for it, and that is to cancel it or strike it from the assessment-roll, and such is the form of relief which the statute prescribes in such cases. It is evident that the Legislature had this distinction in mind when requiring the petition for the writ to contain the statement that "application has been made in due time to the proper officers to correct such assessment." It must be assumed that the word "correct," as thus used, was employed in its ordinary sense and in accordance with its proper meaning in connection with the particular subject-matter to which it referred. Such meaning naturally and properly refers the provision in question to an erroneous assessment which presupposes jurisdiction, but imports error in the manner of exercising it. Had the language been "to correct the assessment-roll with respect to such assessment," it would have been aptly used with reference to illegal as well as erroneous assessments; but under the statute as it stands no such breadth of meaning can properly be given to it. That the provision in question was intended by the Legislature to relate only to cases where a review is sought on the ground that the assessment is erroneous is further emphasized by the provision of section 253 of the Tax Law, which defines the relief that the Court may grant in the proceeding. It is there provided that the Court

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"may order such assessment, if illegal, to be stricken from the roll, or, if erroneous or unequal, it may order a reassessment of the property of the petitioner or the correction of his assessment upon the roll, in whole or in part. * * *" In the use here made of the word "correction," we have a certain guide to the sense in which the word "correct" was used in the previous section. Where the assessment is illegal—that is, a legal nullity—it is appropriately required to be stricken from the assessment-roll; but where there was authority to make it, but error only in the manner of making it, the direction, with equal aptness, is that it should be corrected. Similar words or phrases contained in a statute are to be given the same meaning, unless the contrary plainly appears. Another rule which is equally well founded is the fundamental one that "it is the spirit and purpose of a statute which are to be regarded in its interpretation; and if these find fair expression in the statute it should be so construed as to carry out the legislative intent, even although such construction is contrary to the literal meaning of some provisions of the statute" (People ex rel. Wood v. Lacombe, 99 N. Y., 43, 49). It is, I think, quite plain that the Legislature intended that the statement under consideration should be inserted in the petition only in cases where the assessment is sought to be reviewed on some other ground than that it is "illegal," as that word is used in the statute. The same question arose at Special Term in the case of People ex rel. Powder Co. v. Feitner (*supra*). The facts of that case were the same as those of the case at bar. A similar motion to quash was also made on the ground, among others, that the petition did not contain the statement for the absence of which this

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proceeding is assailed. The motion was denied on the ground that where the complaint is that the assessment was void, the statute, properly construed, did not require the petition to contain any such statement. Upon the appeal to the Appellate Division that point was not passed upon, the Court saying that it was admitted by the counsel for the respondents in his brief that no application to the commissioners was necessary in such a case. Notwithstanding this, the question has been again raised here. My conclusion is that the objection is untenable, and that the writ was properly issued.

Action denied, with ten dollars costs.

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF
THE ACCOUNTS OF HARRIET RUTLEDGE, AS EX-
ECUTRIX, ETC., OF WALTER HEARD, DECEASED.

NEW YORK COURT OF APPEALS, FEBRUARY, 1900.

§ 2730.

*Construction of section 2730, Code of Civil Procedure — Discretion
of Surrogate to withhold executor's commissions.*

The provisions of the Code (§ 2730), that "on the settlement of the account of an executor or administrator, the Surrogate must allow to him for his services" the commissions named, do not require that commissions must be allowed in every case; but where it appears that the administrator has been neglectful of his duties towards the estate the Surrogate may, in his discretion, withhold commissions.

(Decided February, 1900.)

Appeal from an order of the Appellate Division, Fourth Department, which affirmed a decree of the Surrogate of Ontario county.

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Henry M. Field and Frank Rice, for appellants.

John Gillette, for respondent.

GRAY, J.—Upon the accounting of this executrix, objections were filed and a hearing had before the Surrogate, who rendered his decision with findings of fact and conclusions of law, upon which a final decree of the Surrogate's Court for the county of Ontario was duly entered, which judicially stated and settled the account. Upon appeal, the decision was unanimously affirmed by the Appellate Division in the Fourth Department, and appeals were taken by the executrix, and by other parties interested in the estate, and in its distribution, to this Court.

I think no error has been presented which, in view of the unanimous affirmance of the decree of the Surrogate's Court, would warrant a reversal of the order and that it should be affirmed. The only question demanding any consideration by this Court arises upon the exception of the executrix to the Surrogate's conclusion that she was not entitled to commissions. There had been the finding of fact that she "did not give proper personal attention to the estate she had in charge, but delegated to her counsel duties which were imposed upon her as such executrix, knowing that he represented conflicting interests." The question is whether a Surrogate has the power to withhold commissions upon the facts of the case, or whether he is without discretion in the matter and must, in all cases, allow commissions at the rate fixed by the statute.

It may be that this question is still open to us; but I do not think that it can be said that the question of the right to deny commissions was not deliber-

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ately passed upon in *Stevens v. Melcher* (152 N. Y., p. 583). The point was distinctly made by counsel in that case that "the General Term erred in affirming the judgment of the Special Term and referee in refusing to allow commissions to Mrs. Stevens." Mrs. Stevens was the executrix, whose commissions were in question, and it was claimed, in answer to the appellants' point, that, under the facts found by the referee, his conclusion as matter of law that Mrs. Stevens was not entitled to commissions, necessarily followed. The controversy with respect to commissions was discussed in the opinion; which, after referring to the facts which the referee had found relative to the manner in which Mrs. Stevens had discharged her duties as executrix, held that, upon the findings, the conclusion of the referee should be sustained.

In *Wheelwright v. Rhoades* (28 Hun, 57), which related to the settlement of the accounts of executors, it was said by Davis, P. J., delivering the opinion of the General Term in the First Department, that "it is in the power of the Surrogate or Court to deny all commissions where there has been misconduct on the part of executors, resulting in losses to the estate greater than the lawful compensation. And executors may be personally charged with losses and injuries prejudicial to their trust, and denied commissions altogether, in the sound discretion of the Court, in cases deserving great severity of censure."

In *Matter of Curtiss* (9 App. Div., 285), the Appellate Division in the Second Department affirmed a decree of the Surrogate upon his decision. Surrogate Silkman, in that opinion, used this language: "Under the provisions of the Code as they exist, there is no power to deny such commissions except

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for misconduct on the part of the executor or trustee."

In Matter of Estate of Harnett (15 N. Y. St. Rep., 725) Surrogate Ransom held that the administratrix should be denied commissions, because she had been grossly delinquent in her administration of the estate.

It is sought to make a distinction between what a Court of equity may do and what the Surrogate's Court, being one of limited jurisdiction, may do with respect to executor's commissions. It is said that while a Court of equity, with its general powers and jurisdiction, might withhold commissions, in its discretion, a Surrogate's Court, for the lack of those powers, is under the strict mandate of the statute. The provision of the statute, which is found in section 2730 of the Code, reads that : "On the settlement of the account of an executor or administrator, the Surrogate must allow to him for his services," etc., and it is argued that in that language there is no room for the suggestion that anything is left to the discretion of the Surrogate. I do not feel so confident, however, that the language requires of us that we read it with such strictness. Is there not an implication that services must have been rendered and, further, that the services must have been beneficial to the estate? If no services were rendered and the executor or administrator was delinquent in that respect, or if the services were such as were prejudicial to the just and lawful administration of the estate, then, were there such services rendered to the estate, for which the Surrogate must allow commissions? I doubt it and I doubt if there be any good reason for our making the distinction which is contended for. I cannot think that, where the author-

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ity for commissions to an executor or administrator depends upon one statutory provision, they may be denied, if the accounting happens to be in a Court of equity, and must, under all circumstances, be allowed if the accounting happens to be in the Surrogate's Court.

I am of the opinion that the language of the statute is not necessarily exclusive of all discretion in the Surrogate and that its exercise should be left to him upon the facts, in the review of which by the Appellate Division ample opportunity for correction is afforded. I do not know that there is any public policy involved in this matter, and yet it seems to me that a better policy is subserved by making the allowance of commissions to executors and administrators depend upon the faithful rendition of services by them and by giving such a construction to the section of the Code in question as will vest some discretion in the Surrogate upon the subject.

The order appealed from should be affirmed, with costs to all parties appearing in this Court by counsel and filing briefs, payable out of the estate.

PARKER, Ch. J. (dissenting)—I dissent from so much of the decision declared by the majority of my associates in this case as affirms the order of the Surrogate refusing commissions to the executrix, Harriet Rutledge.

As to the other questions, I agree that they are put beyond our reach by the unanimous decision of the Appellate Division, by which the findings of fact of the Surrogate are made conclusive.

The executrix in this case is a woman without much business experience, and she suddenly found herself placed, by the will of her brother, in charge

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of an insolvent estate, the situation being complicated by the fact that the testator had received funds, as trustee, and had commingled these funds with his own in the matter of making investments. It was impossible in some instances to trace the trust fund into securities found in his possession, and to advise and aid her in the execution of the trust she employed an attorney, who seems to have made some serious mistakes — mistakes for which the Surrogate has held the executrix responsible. Not content with that, he concluded further to punish her for having reposed too much confidence in her attorney by imposing upon her a fine in the amount of her commissions. This he had no power to do.

The statute fixes the compensation to be allowed by the Surrogate to executors and administrators absolutely. It confers no discretion whatever upon that officer, who can neither add to nor take from the amount fixed by the statute. Whether the services performed be little or much matters not, for the statute declares the basis upon which such amount shall be computed. If the Legislature had intended that the Surrogates of the State should be vested with the authority to grant or withhold commissions in their discretion it would have said so, but it did not vest Surrogates with any discretion whatever in that direction, and that its action was wise experience teaches and this case illustrates. But whether it was wise or otherwise is of no consequence, for the power was vested in the Legislature alone to determine whether commissions should be allowed, and upon what basis, and having allowed commissions in this class of cases its action is conclusive upon the Surrogates of this State.

Our attention has been called to some authorities

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which, it is suggested, show that this Court has held that a Surrogate can withhold commissions from an executor or administrator as a punishment for negligent conduct. Those authorities hold no such thing, as I shall point out later; but if they did, it would be the duty of this Court to disregard them, for it is the statute, not the decisions, which constitutes the law of this State upon that subject.

Turning to the provisions of the statute, which may now be found in section 2730 of the Code, we read: "On the settlement of the account of an executor or administrator, the Surrogate must allow to him for his services, and if there be more than one, apportion among them according to the services rendered by them respectively, over and above his or their expenses. For receiving and paying out all sums of money not exceeding \$1,000, at the rate of five per centum. For receiving and paying out any additional sums not amounting to more than \$10,000, at the rate of two and one-half per centum. For all sums above \$11,000, at the rate of one per centum. * * *" There is no room for the suggestion that in the language quoted above there is anything left to the discretion of the Surrogate. He is commanded to allow the commissions. If the executor squanders any part of the estate, the Surrogate must charge him with the diminution; if he loses a part of it through negligence, the Surrogate must charge him with the loss; if he commingles the funds with his own, the Surrogate may charge him with interest computed with annual rests, so that the estate may be fully protected; but the Surrogate cannot do more. He cannot impose fines and penalties because in his judgment the conduct of an executor or administrator merits it. The Legislature took away from him

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all opportunity for doing so by its command that he "must" allow commissions at a fixed rate.

Now, it is true that there have been a few instances where, in defiance of the statute, commissions to which an executor or administrator were entitled have been disallowed by Surrogates who doubtless thought they had the power so to do.

But whatever may have been decided in Surrogate's Court there are no decisions in this Court holding that a Surrogate possesses the power to withhold the commissions of an executor or administrator, either because he thinks the services were not worth the amount fixed by the statute or because the executor was advised wrongly by his attorney.

My attention has been called to several cases in this Court in which the question of commissions of trustees has received consideration, namely, *Cook v. Lowry* (95 N. Y., 103), *Layton v. Davidson* (95 N. Y., 263), *Matter of Petition of Allen* (96 N. Y., 327), and *Stevens v. Melcher* (152 N. Y., 551). Every one of those cases presented the question whether commissions should be allowed to trustees, and in each of them the original decree was not by a Surrogate, but by the Supreme Court on its equity side. In *Layton's* case, appellant's counsel contended that the statute did authorize the fixing of the rate of compensation of testamentary trustees, and it was said in the opinion that the executors had had a final accounting, and been discharged as such, and that the fund had been exclusively a trust fund under the will, and it was held that the Court had jurisdiction to award commissions to testamentary trustees, thus concurring in an opinion on that subject to be found in *Matter of Roosevelt* (5 Redfield, 601). *Cook v. Lowry* was an action for the construction of a will

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and for an accounting of the trustee appointed after the discharge of the executors, and as he had put the cestui que trust to great trouble in determining his rights, the trial Court held that the trustee's commissions could be withheld and that decision was affirmed in this Court. The Matter of Allen did not involve that question at all; there the testamentary trustee applied to the Supreme Court to be released from the trust and the Court concluded not to award him compensation as if he had performed the trust to the end, but instead ordered fixed a sum of money which it determined to be reasonable in view of the labor performed, and that order was affirmed in this Court, it being held that compensation could not be claimed as of course, because that rule applies only where the trust created has been fully executed, that the petitioner applied for his discharge, and, it being tendered him if he saw fit to accept it, he had to do so upon the terms and conditions imposed by the Court, one of which was that he should accept a certain sum of money in lieu of fees. *Stevens v. Melcher* was an action for an accounting and presented many questions, one of which was whether the trustee, against whom findings of serious misconduct had been made on the trial, might be disallowed commissions in accordance with the conclusion of the trial Court based upon such findings, and it was decided that they might be withheld.

As I have already said, in not one of these cases was the statute to which I have referred considered. That statute refers to the commissions of executors and administrators only and governs this case, while in the cases considered (*supra*) the question related to the compensation of testamentary trustees, for which section 2730 of the Code does not provide. By

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chapter 115 of the Laws of 1866 trustees were authorized to have their accounts as such trustees finally settled before the Surrogate, the act providing a practice the same as where an account is rendered by an executor or administrator, including an appeal from the decree of a Surrogate, and it also provides that the Surrogate shall allow to the trustee or trustees the same compensation for his or their services by the way of commissions as is allowed by law to executors and administrators. Prior to that time testamentary trustees were liable to account to a Court of equity in the case of a trust expressly created by any last will or testament (2 R. S., 94, § 66). It was this section that was amended by chapter 115, Laws of 1866 (*supra*). As there was no statute commanding Courts of equity to allow any compensation whatever to testamentary trustees, that Court was not accustomed to allow any compensation down to the enactment of the act of April, 1817, declaring it to be lawful for the Court of Chancery to make a reasonable allowance to executors, administrators and guardians. Prior to that time executors and administrators, like other trustees, were not allowed anything for their services. The first case after the passage of the act of 1817 was *Matter of Roberts, a lunatic* (3 Johns. Ch., 43), in which Chancellor Kent considered the case of a committee of a lunatic as coming within the equity of the statute of 1817, and fixed his compensation. Later, in *Meacham v. Sternes* (9 Paige's Ch., 398), which was a case in which the Court was asked to fix the compensation for trustees, where the deed creating the trust contained no provision as to their compensation, the chancellor said: "The question, therefore, appears to be presented for the decision of the Court, whether

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such a trustee is entitled to compensation for his services, within the equity of the act of April, 1817, and of the provisions of the Revised Statutes as to the allowances to be made to executors, etc. * * *

It may, therefore, be considered the settled rule, so far as the decision of this Court can settle it, that in all cases of trusts of this description and all other express trusts of a similar nature, where nothing is said in the deed or instrument creating the trust on the subject of compensation to the trustee for his personal services in the execution of the trust, and where there is no agreement on the subject for a different allowance that the trustee, upon the settlement of his accounts, will be allowed the same fixed compensation for his services, by way of commissions, as are allowed by law to executors and guardians, and to be computed in the same manner. In other words, the Court will consider the statutory allowance to executors, administrators and guardians as the compensation tacitly understood and agreed on by the parties to all trusts of a similar nature, where nothing appears to show a different agreement or understanding on the subject of compensation." As the Court was not hampered by statute in that regard, it allowed compensation as a matter of justice, but when it came to a case where the trustee had neglected to perform his duty, it withheld compensation. When the Legislature came to enact chapter 115 of the Laws of 1866, it recognized this jurisdiction of equity, and did not interfere with the rate of compensation to be allowed by that court in cases where accountings of trustees should be had before it, but simply authorized trustees to account before the Surrogate, and commanded the Surrogate to allow the same rate of com-

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pensation as by statute was allowed to executors and administrators. As originally enacted, the Revised Statutes of 1828 provided that on the settlement of executors or administrators, "the Surrogate shall allow to them for their services," etc. (2 R. S., 93, § 58) (since that time for "shall," has been substituted "must," a word which, to say the least, does not tend to detract from the forcefulness of the command of the statute), and shortly thereafter, in the year 1836, a decree of the Surrogate of the county of New York came up for review before the chancellor. One of the questions presented was whether the Surrogate had the right to withhold the commissions of an administrator because of his gross misconduct of the administration of the intestate's estate. The chancellor said: "The Surrogate takes no power by implication; and the direction of the statute is positive that upon the settlement of the account of executors and administrators in a proceeding before him, the Surrogate shall allow them certain specified commissions for their services over and above their expenses, except in those cases where a specific compensation for such services is allowed by the will of the decedent (2 R. S., 93). The appellant, therefore, had the same right to be credited his legal commissions for receiving and paying out the moneys of the estate as he had to be credited for moneys paid by him for debts and funeral expenses (*Halsey v. Van Amringe*, 6 Paige's Ch., 16). In *Dakin v. Denning* (6 Paige's Ch., 95) the chancellor had before him the same question on an appeal from the decree of the Surrogate of the county of Oneida, and he said: "Indeed, the statute under which the Surrogate supposed he was proceeding to take this account is imperative that he shall allow the personal representa-

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tives such commissions; and this Court has recently decided that the Surrogate has no discretion on the subject." Citing *Halsey v. Van Amringe* (supra).

The statutes and cases cited, together disclose that, prior to 1817, executors, administrators and trustees were not compensated for their services. The act of April 15, 1817, did not fix the rate nor direct the allowance of compensation. Instead, it declared that it should be lawful for the Court of Chancery, in the settlement of the accounts of guardians, executors or administrators, to make a reasonable allowance to them for their services. The chancellor settled the rate of allowance in *Matter of Roberts* (supra), and in the same month a general rule, adopting the basis of the *Roberts* case for allowances, was passed for all cases. From that date to this, the Legislature has not attempted to interfere with the practice of Courts of equity in such cases, and we need not go far afield to find the reason for it. But as we are considering the effect of a statute, we pass that by and note that upon the enactment of the Revised Statutes in 1828 the Legislature commanded the Surrogates to allow a certain rate of compensation to executors and administrators. It did not provide for the compensation of executors and administrators generally, which would have included accountings in a Court of Chancery as well as before the Surrogate; but the direction was to the Surrogate, thus again manifesting the legislative policy to be one of non-interference with the jurisdiction of chancery under that head. The Court of Chancery continued to exercise exclusive jurisdiction as to the accounts of trustees of express trusts until 1866, during all of which time it was accustomed to compensate trustees on the same basis as executors

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and administrators, although it occasionally withheld compensation for misconduct. It is noticeable that the act of 1866 (chap. 115), following consistently all previous legislation upon the subject, did not attempt to provide a rate of compensation to testamentary trustees generally, which would have included such accountings in a Court of equity, but it commanded the Surrogate that in accountings of testamentary trustees before him he should allow to them compensation the same as allowed to executors and administrators.

Enough has already been said to make it clear that the persistent insistence that the decisions to which I have referred require this Court now to hold that the statute directing Surrogates to allow commissions is to be followed or not in the discretion of the Surrogate, is wholly without foundation, and, therefore, those decisions do not embarrass this Court in giving to the statute that construction which was given to it almost immediately upon its enactment, a construction required by every rule of statutory construction applicable, and one which does not permit the Surrogate's Court to set at naught the command of its creator, the Legislature, that it "must allow" to an executor or administrator the compensation provided in section 2730.

BARTLETT, VANN and CULLEN, JJ., concur with GRAY, J., for affirmance; MARTIN and WERNER, JJ., concur with PARKER, Ch. J.

Order affirmed.

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